the weekly Standard

APRIL 19, 2010 • $4.95

WISHFUL THINKING ON NUKES
MICHAEL ANTON • WILLIAM KRISTOL

AMERICANS AS LAB RATS

Dr. Obama experiments with behavioral economics

BY ANDREW FERGUSON

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THE OBAMA HEALTH PLAN TEARS UP YOUR CONSTITUTIONAL RIGHTS

Dear Patriots, The enactment of the Obama health law is a bruising blow to American freedom and medical excellence. But the war is not over. There can be no negotiation between freedom and coercion.

The Obama health law forces you to buy a one-size-fits-all health plan, whether you want it and can afford it or not, and expands the powers of the IRS to punish you for noncompliance. This violates your rights. Nothing in the U.S. Constitution permits this coercion. In fact, the 28 beautiful words of the Tenth Amendment prohibit it.

For the first time in history, the Obama health law empowers the federal government to dictate how doctors treat privately insured patients. That means the federal government will be in control of your care even if you have Aetna, Blue Cross, Cigna or any other "qualified" insurer. Your insurer can pay only doctors who implement whatever regulations the federal government imposes in the name of improving health care "quality." That covers everything in medicine. (Sect. 1311, pg. 148).

To halt this attack on something as precious as life itself - your liberty - we must advance to the next battlegrounds, the U.S. courts and the Fall elections.

The White House is launching a fifty state p.r. campaign, falsely telling the American people that the law just

We cannot falter now.

enacted against their will is to their benefit.

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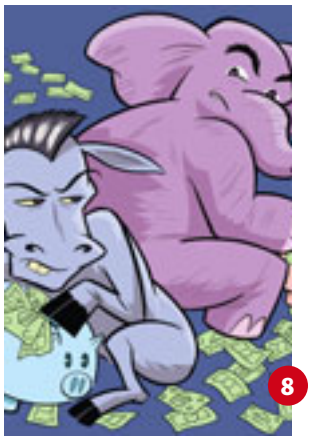

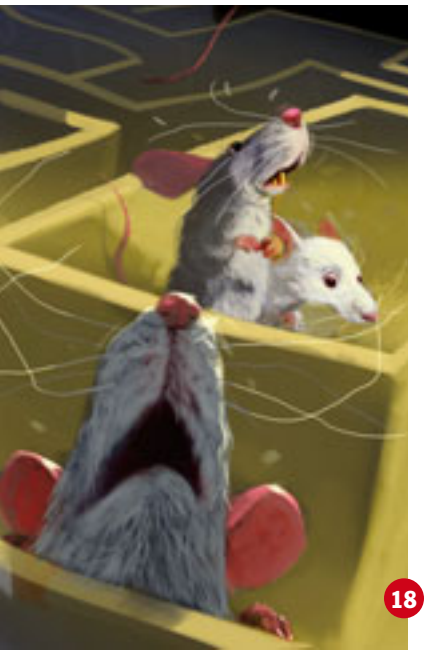

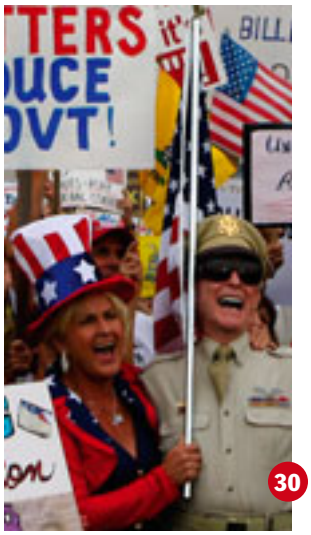

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Hank Johnson's Tipping Point

Say what you will about Georgia's Fourth Congressional District—DeKalb County, for the most part, just east of Atlanta—it has certainly blessed us with some interesting representatives. The incumbent, a 55-year-old Buddhist Democrat named Hank Johnson, was preceded by Cynthia McKinney, the leading congressional conspiracy theorist of her day, who was once celebrated in the pages of the *Washington Post* for threatening to assault 69-year-old Henry Hyde, R-Ill., on the floor of the House.

Lately, however, Hank Johnson has achieved an enduring fame, in the Internet era, that congressmen of yesteryear could only dream about. It began on March 25 when Admiral Robert Willard, chief of the U.S. Pacific Command, was testifying before the House Armed Services Committee. A proposal to post several thousand more U.S. Marines (and their dependents) on Guam—an Obama administration initiative, by the way—came under discussion.

As the millions of viewers on YouTube who have savored the exchange can attest, Congressman Johnson expressed his concerns to Admiral Willard in decidedly unique fashion.

> JOHNSON: This is an island that, at its widest level is, what, 12 miles from shore to shore? And at its smallest level or smallest location, it's seven miles between one shore and the other. Is that correct?
>
> WILLARD: I don't have the exact dimensions; but to your point, sir, I think Guam is a small island.

Congressman Johnson then went on to speculate about the square mileage of Guam—212, as it happens—which led, in turn, to his basic argument:

> JOHNSON: Yes, my fear is that the whole island will become so overly populated that it will tip over and capsize.
>
> WILLARD: We don't anticipate that. The Guam population is, I think currently, about 175,000—and again, with 8,000 Marines and their families, it's an addition of about 25,000 more into the population.
>
> JOHNSON: And also, things like the environment, the sensitive areas of the environment—coral reefs and those kinds of things. And I know that, you know, lots of people don't like to think about that, but you know, we didn't think about global warming, either.

Admiral Robert Willard

As readers can imagine, this is one of those videos that went "viral," and subjected Johnson to such universal derision and merriment that his office was obliged, later that day, to issue a "clarification" in which it was explained that his theory about Guam tipping over and capsizing from an abundance of Marines was an "obvious" joke.

But was it? It is difficult to read his words (or watch as he utters them) without drawing the conclusion that they said precisely what he meant, and that Congressman Johnson believes islands are something like inflatable rafts, prone to tipping over—or even sinking, if inhabitants should jump up and down.

Three things impress THE SCRAPBOOK about this vignette of life in official Washington. First, we are frankly in awe of Admiral Willard's ability to maintain a straight face when confronted with a prime specimen of congressional lunacy. Readers need to watch the video on YouTube to appreciate fully the pregnant pause between Congressman Johnson's line about Guam tipping over and capsizing and Admiral Willard's deadpan response: "We don't anticipate that." That's military discipline.

Second, we were equally impressed by the fact that, when Admiral Willard admitted that he did not know the exact square mileage of Guam "but I can certainly supply it to you if you like," Congressman Johnson leaned back in his chair, and responded, "Yes." THE SCRAPBOOK asks: Is there no one on Congressman Johnson's staff who can look up such things in the office almanac? Does the congressman really think that the United States commander in the Pacific has nothing better to do with his time than perform insulting clerical tasks for an ignorant legislator?

Which brings us to our third, and not so humorous, point. Guam is an American possession because Marines liberated it from the Japanese during World War II (1,747 killed and 6,053 wounded in two and a half weeks of pitched battles), and it has remained a strategic naval outpost ever since. It is, of course, unlikely that additional Marines and their families will cause Guam to tip over, or cause damage to nearby coral reefs, but Hank Johnson's questions reflect an underlying attitude toward our armed forces that is both bumptious and infuriating. The presence of U.S. Marines on Guam—apart from the boost they will give the local economy—is an asset, not a liability. The arrival of men and women prepared to defend the United States with their lives is not a malignant invasion of Guam—like the brown tree snakes that have devastated its ecology—but a blessing for which all

REUTERS

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Americans, including the electors of Georgia's Fourth Congressional District, can be grateful. ♦

Green'peace'

One of the climate-change extremists at Greenpeace showed his true colors (not green and not very peaceful) in an April 1 posting at the Greenpeace Climate Rescue blog (weblog.greenpeace.org) that, alas, was not an April Fool's joke:

> Pressuring politicians on climate change is not working. We saw that in Copenhagen. Three months later, we also know why. Which is why the global climate movement now must do course-correction. We need to shift targets and go after the real termites that hollowed out and imploded Copenhagen.
>
> Not Barosso, Obama or Wen Jiabao, but the real obstacles to the climate deal this planet deserves and demands. The oil and gas mafia running loose in New Delhi. The coal magnates that have Canberra by the short and curlies. The petrochemical giants that have placed a firm jackboot on the EU's throat. The fossil fools and nuclear lobbyists that have Washington DC on speed-dial.
>
> We need to hit them where it hurts most, by any means necessary: through the power of our votes, our taxes, our wallets, and more. . . .
>
> Emerging battle-bruised from the disaster zone of Copenhagen, but ever-hopeful, a rider on horseback brought news of darkness and light: "The politicians have failed. Now it's up to us. We must break the law to make the laws we need: laws that are supposed to protect society, and protect our future. Until our laws do that, screw being climate lobbyists. Screw being climate activists. It's not working. We need an army of climate outlaws." . . .
>
> If you're one of those who have spent their lives undermining progressive climate legislation, bankrolling junk science, fueling spurious debates around false solutions, and cattle-prodding democratically-elected governments into submission, then hear this:
>
> We know who you are. We know where you live. We know where you work. And we be many, but you be few.

Nothing like cool, scientific discourse from the climate change community. The author, Gene Hashmi, is the communications director of Greenpeace India. You'll be pleased to know that a superior "clarified" his remarks as follows: It would be "very easy to misconstrue that line, take it out of context and suggest it means something wholly different from the practice of peaceful civil disobedience. . . . Anyone who knows Gene knows he's an entirely peaceful guy." Entirely. ♦

Nuclear Footnote

In his review of the Obama administration's Nuclear Posture Review on page 24, Michael Anton makes the point that the Nuclear Posture Review did not end up as bad as it might have been. But Anton sends this footnote to The Scrapbook:

> This is to distinguish "bad" from "vapid." In documents like this, one must expect and be prepared to endure pronouncements such as this: "The United States seeks to bolster the non-proliferation regime by reversing the nuclear ambitions of North Korea and Iran." Really? How? By "demonstrat[ing] that we are prepared to engage multilaterally and bilaterally with these states to arrive at negotiated solutions that provide for their political and economic integration with the international community, while verifiably confirming they are not pursuing nuclear weapons capabilities." Oh. ♦

'Despite'?

'Corin Redgrave, 70, the scion of a powerful acting dynasty who shone equally in light comedy and Shakespearean tragedy and who, despite excelling as authority figures, was a committed Marxist, died April 6 at his home in London" (*Washington Post*, April 7). ♦

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What They Were Thinking

Mahmoud Ahmadinejad and Armed Forces Chief of Staff Hassan Firouzabadi at Iran's Fourth National Anniversary of Nuclear Technology Day, in Tehran, April 9, 2010

REUTERS / MORTEZA NIKOUBAZL

Sentences We Didn't Finish

'A lot of people have asked, why is it you seem so calm? And what I've tried to say often—and a lot of times this gets discounted in the press—is that the experience of having traveled throughout this country; having learned the stories of ordinary folks who are doing extraordinary things in their communities, in their neighborhoods; having met all the people who put so much energy and effort into our campaign; having seen the ups and downs and having seen how Washington was always the last to get what was going on, always the last to get the news—what that told me was that if we were willing to not do what was expedient, and not do what was convenient, and not try to govern based on the polls today or tomorrow or the next day, but rather based on a vision for how we can rebuild this country in a way that works for everybody—if we are focused on making sure that there are ladders of opportunity for people to continue to strive and achieve the American Dream and that that's accessible to all, not just some—if we kept our eye on what sort of future do we want for our kids and our grandkids so that 20 years from now and 30 years from now people look back on this generation the way we look back on the Greatest Generation and say to ourselves, boy, they made some tough decisions, they got through some tough times, but, look, we now have a clean energy economy; look, our schools are revitalized; look, our health care system works for every single American—imagine how tough that was and how much resistance they met from the special interests . . . " (Barack Obama's 304-word sentence at a DNC fundraiser in Boston, April 1, as transcribed by Andrew Malcolm of the *Los Angeles Times*. Not to be confused with Obama's taking 17 minutes and 2,500 words to avoid giving an honest one-word answer—"yes"—to a woman in Charlotte on April 2 who asked him if it was a "wise decision to add more taxes to us" with health care reform.) ♦

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Betamaxed Out

The advent of the new Apple iPad prompted me last week to read a long, glowing account of it in the *Wall Street Journal*. The author, Walter S. Mossberg, offered that the iPad has "the potential to change portable computing profoundly." He then served up this observation: "It could even help, eventually, to propel the finger-driven, multitouch user interface ahead of the mouse-driven interface that has prevailed for decades."

I don't know about you, but if Mossberg had written that sentence in Linear B, or even Sanskrit, it would be only slightly more incomprehensible to me than it is in English. I think I understand, more or less, what he's driving at, but it took me a few minutes of guessing about the meaning of "interface" and "multitouch" to figure it out. And it's still only a guess.

Which is another way of saying that, for good or ill, I am not now, and never have been, a technology guy. Growing up in the 1950s, I did not build crystal sets, assemble plastic aircraft carriers with glue, or possess a soldering iron. I was bored by the Mercury astronauts, even John Glenn; I am totally indifferent to aviation in all its forms; I never took shop class; and, in my own variation of Churchill's line about time spent in the saddle, consider any minutes spent under the hood of my car to be minutes irrevocably wasted. On the rare occasion when I am dragged to a computer store I feel as if I am surrounded by the same sort of people (almost invariably men) who inhabited stereo/hi-fi showrooms in the Kennedy-Johnson days.

In my defense as a male of the species, by the way, I should point out that I am perfectly capable of handling most tools, when required to do so, and was a better-than-average athlete at school and camp. I also subscribe to Churchill's aforementioned line—"No hour of life is wasted that is spent in the saddle"—and can shift gears and change a tire on any car. Yet when it comes to electronic/computer gadgetry, not only am I actively uninterested in nearly everything about them, but I have striven to lead a happy, fulfilled existence, as much as possible, in their absence.

I do possess a cell phone, for example—but this is only at the insistence of my alluring wife, and I seem to use it about once a week ("Do you want me to pick up some English Muffins on the way home?"). Indeed, my wife, who is in most respects an admirable person, seems to me tragically tethered to her BlackBerry, which is forever buzzing and ringing with messages from colleagues, and unwelcome late-night inquiries from London or Beirut, which must be answered immediately. I've never gotten an urgent message from the boss on my cell phone, am reasonably certain he doesn't know my number, and am absolutely confident that anything he needs to tell me can wait until tomorrow.

MATT COLLINS

I should also point out that, averse as I may be to contemporary gadgetry, I am not a Luddite. I have long since made my peace with DVDs and CDs—although, as I feared when vinyl LPs disappeared from the market, there are innumerable recordings (Glenn Gould's version of the Schoenberg *Suite für Klavier*, the last time I looked) that don't exist on compact discs. Accordingly, I still retain a certain number of cherished long-playing albums and a lifetime's supply (acquired two decades ago) of diamond needles.

And of course, I have made my living in the journalism game for four decades, where computers have been an integral part of the fun since the late 1970s/early '80s. I write on a computer—although not on a laptop, since I am a self-taught, two-finger, hunt-and-peck typist—and can transmit what I have written to wherever it needs to go. I can surf among blogs and relevant websites on the Internet, engage in commerce, flirt on Facebook, follow leads and trails into Googleland. And that's enough: I still consume a fair number of newspapers and magazines in virginal form and have no interest at all in reading books online.

Which brings me back to the iPad. At first I thought it was a variant of the iPod; but as Walter ("Multitouch User Interface") Mossberg reports, it appears to be more ambitious than that. To which I respond: Thanks, but include me out. I cannot imagine walking down a city street listening to music from an earplug affixed to the side of my face, and the convenience of adding some finishing touches to an annual report while traveling on an airplane sounds like torture to me. My idea of a satisfactory airline journey usually involves reading a book printed on paper, or consuming enough complimentary beverages to facilitate intermittent dozing between meals.

Philip Terzian

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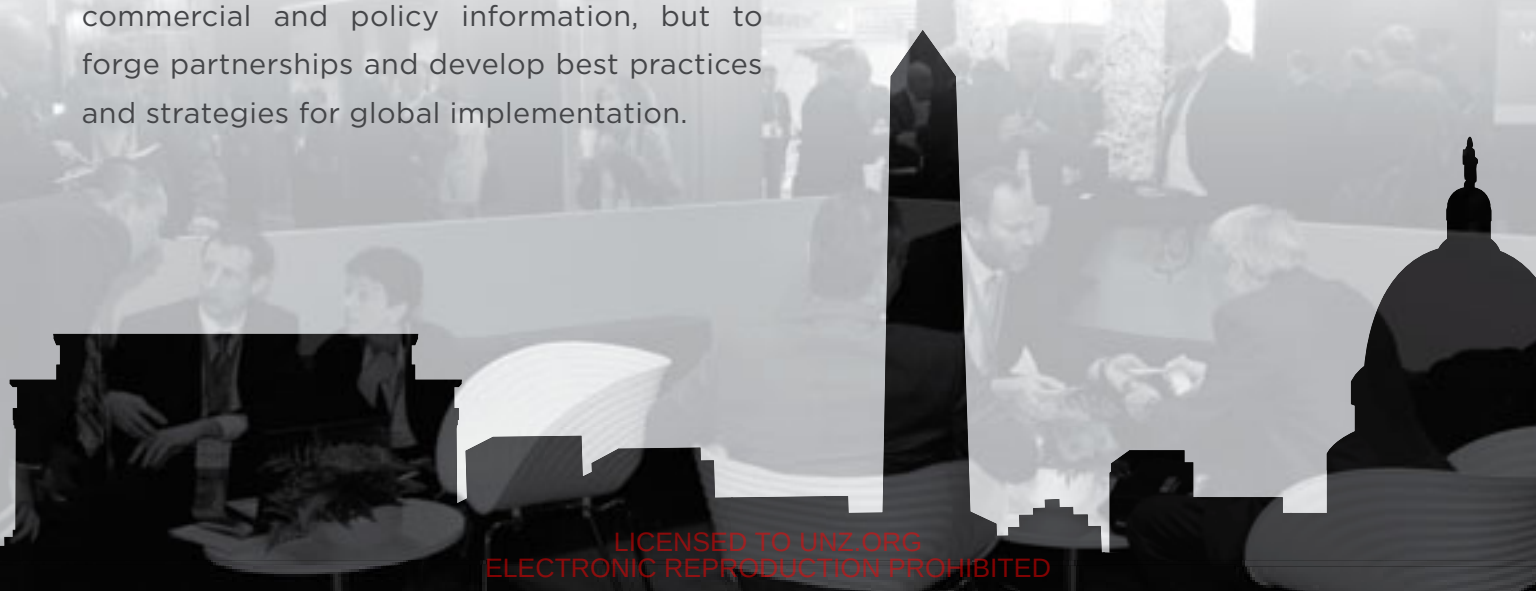

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the weekly Standard

Resignation

Friday, April 9 was a day of resignation. Justice John Paul Stevens announced he was resigning from the Supreme Court at the end of this term. Representative Bart Stupak said he wasn't running for reelection to the House of Representatives. And President Barack Obama made it clear he's resigned to a nuclear Iran.

Appearing on ABC's *Good Morning America*, Obama told George Stephanopoulos:

> If the question is do we have a guarantee [that] the sanctions we are able to institute at this stage are automatically going to change Iranian behavior, of course we don't. I mean, the history of the Iranian regime, like the North Korean regime, is that, you know, you apply international pressure on these countries, sometimes they choose to change behavior, sometimes they don't.

You try to do your thing with your buddies in the international community, and, you know, sometimes people choose to change behavior, sometimes they don't.

In the case of North Korea, they didn't. After years of "international pressure," after countless multiparty meetings producing endless hectoring statements and plaintive pleas, with carrots proffered and sticks brandished by our State Department in bewildering succession, here's the end of the story: North Korea has nuclear weapons. Now Obama is telling us that he intends to deal with Iran as we dealt with North Korea. So, as the Iranians follow in the footsteps of the North Koreans and move ahead to get nukes, we're going to do nothing about it.

Jonathan Tobin summarized the situation on *Commentary*'s website:

> With Russia and China effectively blocking any hope for crippling sanctions, with the threat of force off the table, and with the president now openly preparing the nation for America's failure, why should the Khamenei/Ahmadinejad regime do anything but use all the extra time Obama has gifted them with to forge ahead toward their nuclear goal?

Sure enough, within hours the Iranian regime was forging ahead. The same day as Obama appeared on *Good Morning America*, Mahmoud Ahmadinejad spoke at a ceremony in Tehran marking the Fourth National Anniversary of Nuclear Technology Day. He unveiled an improved centrifuge which would enrich uranium faster and taunted the United States for its failure to halt Iran's nuclear program. "Iran's nuclear path is irreversible," Ahmadinejad said. "The Iranian nation has reached a new point where no power can deter it from moving full speed ahead to reach peaceful nuclear energy."

Not to worry. In Washington, State Department spokesman P.J. Crowley wasn't fooled. After deploring Iranian "chest-thumping," he pointed out that a peaceful nuclear program would have no need for faster centrifuges. So, he said, "We have to conclude that Iran has nefarious intentions with its nuclear program." Savvy conclusion!

What's more, Crowley explained, the Iranian regime is going to get its comeuppance: "That's expressly why we continue to work with the international community on additional measures, sanctions, to show Iran that there is a consequence for its failure to meet its obligations."

But the finger-wagging of the international community won't stop Iran from getting nuclear weapons. The non-chest-thumping Obama administration, it is increasingly clear, is not going to stop Iran either. The only country that may not be resigned to a nuclear Iran is Israel. Its government, at least, disdains resignation to the fact that nefarious regimes sometimes choose to change behavior, but, gee, sometimes they don't. After all, this worldly attitude didn't work out too well for the Jewish people—or the rest of us—in the last century.

The Obama administration knows that Israel is weighing military action against Iran. This accounts at least in part for the administration's turn against Israel in recent weeks—its attempt to further isolate the Jewish state in order to put pressure on it not to act.

So we are pressuring our ally, rather than acting to stop our enemy.

Liz Cheney had it right, speaking in New Orleans the same day Obama chatted with George Stephanopoulos:

> Ultimately, the only way diplomacy will succeed in halting Iran's nuclear ambitions is if the mullahs understand, beyond a doubt, that America will take military action if they don't comply peacefully. No enticements can work—there is nothing the international community can offer Iran that is worth more to them than a nuclear weapon. And watered down sanctions carry their own danger—they buy time for Iran while imposing no cost. The dangers grow to us and our allies with every hour we waste.

What the loyal opposition can do is continue to remind the president of these hard truths, urge him to rethink his wishful ways—and pray that the civilized world will be spared the fearful consequences of time wasting in the face of gathering dangers.

—*William Kristol*

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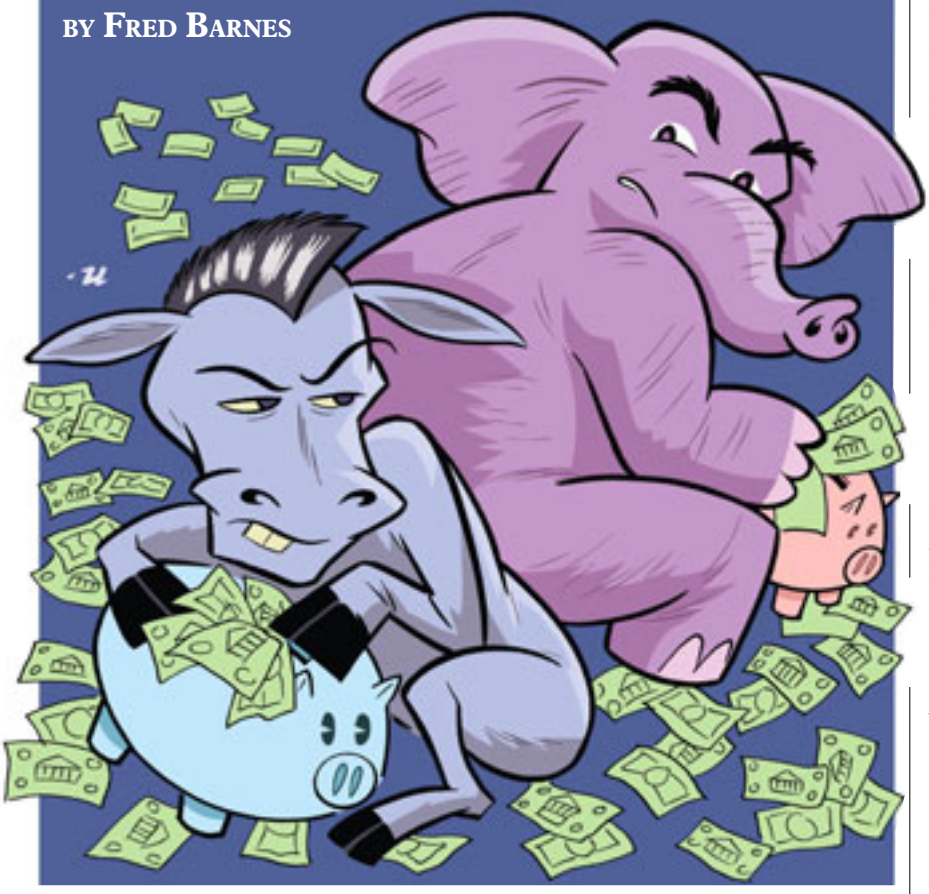
The GOP's Grand New Money

The Four Horsemen of the Republican landslide.

BY FRED BARNES



ROB ULLMAN

For Republicans, campaign finance reform was a nightmare from which they are only now awakening. After the campaign law, better known as McCain-Feingold, was enacted in 2002, Republicans largely ignored the new possibilities it created for affecting the outcome of elections. When the Supreme Court in 2003 upheld most of the provisions of the law, their apathy continued.

Democrats weren't so passive. They immediately reacted to the new campaign spending rules by setting up a cluster of organizations outside the party that played an enormous role in the 2004, 2006, and 2008 campaigns. Republicans suffered through the three election cycles without countering the onslaught by the Democratic outfits. The 2006 and 2008 elections produced Democratic landslides.

But 2010 should be different. Spurred by Karl Rove and Ed Gillespie, Republicans have matched the Democratic infrastructure with organizations of their own. These groups expect to raise and spend tens of millions in this year's midterm elections and probably even more in 2012, when President Obama is likely to be running for a second term.

Their effect could be pivotal. Republican prospects for winning House and Senate seats in November are the brightest since 1994. The new organizations have the potential to push the outcome toward a historic rout that puts Republicans in control of the House, Senate, a solid majority of governorships, and additional state legislatures. At the least, they're positioned to offset the impact of Democratic groups.

What McCain-Feingold did was ban large donations of "soft money" to the Republican and Democratic national committees. But the money didn't dry up. For Democrats, it moved to independent organizations, like MoveOn.org, with no limits on fundraising. Now, at long last, Republicans have started groups of their own:

• *American Crossroads*. It aims to do for Republican candidates what MoveOn, the AFL-CIO, the Service Employees International Union, and Moving America Forward have done for Democrats for several cycles. The group was founded after donors to Republican and conservative causes were consulted to see if they were ready to make big contributions. The conclusion: They are. AC expects to raise around $50 million this year. It began operations last week. Its leader is Steve Law, a former deputy secretary of labor and a little-known but talented political strategist.

• *American Action Network*. This is a think tank founded two months ago and modeled after the Center for American Progress, which produces position papers and policy arguments for Democrats. It is run by former Republican senator Norm Coleman of Minnesota and fundraiser Fred Malek. AAN has a policy arm and an "action" unit run by Rob Collins, former chief of staff for House Republican whip Eric Cantor.

• *Resurgent Republic*. Founded last year, it is a Republican copy of Democracy Corps, the respected polling and research outfit run by Democrats Stanley Greenberg, James Carville, and Bob Shrum. RR is the creation of Whit Ayres, a leading Republican pollster, and Ed Gillespie, former Republican national chairman and a White House

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adviser to President George W. Bush. It does research, surveys, and focus groups to test issues and aid Republican candidates and officeholders.

• *Republican State Leadership Committee*. Gillespie recently became chairman of the freshly invigorated RSLC. Its aim is to support state legislative candidates, capture control of legislatures, and shape congressional redistricting based on the 2010 census in favor of Republicans. Its counterpart is the Democratic Legislative Campaign Committee. RSLC's fundraising goal in 2010 is $40 million.

Republicans and conservatives have a sad history with independent expenditure organizations. They've launched many of them in the past, only to see them go out of business after one election. This time, the four groups were conceived as permanent fixtures in politics.

The arrival of American Crossroads is especially timely, given the turmoil at the Republican National Committee over its chairman, Michael Steele. The RNC's job is to organize and finance so-called victory committees in each state. But its role will shrink if its own fundraising declines sharply. So far, Steele says that's not a problem.

AC grew out of conversations Law had last year with Gillespie and Rove. Before starting the organization, Law ran the successful effort (so far) by the U.S. Chamber of Commerce to thwart congressional passage of "card check," organized labor's pet project for unionizing workers without elections.

Law says AC is beginning operations now, seven months before the election, after "several things started to coalesce." There's "alarm" over the direction of the country, he says, and "an unprecedented opportunity to build on a [Republican] wave." Plus, "there really is an urgent need to build viable, third party, political organizations on the conservative side. Democrats have done a very good job [on the liberal side]."

Rather than run national ads, AC will be active in individual races, tailoring TV spots to specific candidates. And Law is committed to avoiding a controversy that has plagued the RNC and other Republican organizations: lavish contracts for Republican consultants. He's hired a small staff. To get campaign work at AC, consultants will have to submit to open bidding.

Law is planning for the long term. His ambition is to "build a model this year and expand on it for the presidential year in 2012. This year is round one."

As nice as these Republican groups are, do they really matter? I think so. Money isn't everything in politics, but it's better to have as much spent on your behalf as your opponent has spent on his. And independent groups supporting Democrats offer a lot more than money. Just ask a Republican candidate who's been assaulted by MoveOn.org ads.

Republicans haven't peaked. "There's a fever pitch of concern—fear and loathing—about what's going on in Washington," Law says. And it's not dissipating. Republicans are already better organized for a national campaign than at any time in my memory. The new outside groups—the Four Horsemen of the Republican Landslide—are part of that. ♦

Is Cox the One?

A new chairman tries to breathe life into the New York GOP. BY BRENDAN MINITER

New York

It was supposed to be easier than this. New York Republican party chairman Ed Cox put his hand up for his post last year because he thought the tide was coming in and wanted to build a state party that could buoy Republicans this fall. Now, as he sits in his cluttered midtown office explaining his decision to endorse a Democrat turning Republican for governor, he also finds himself explaining why it's important for the GOP to have a knock-down-drag-out nomination fight right now.

Cox has been around politics a long time. Five years ago, he briefly ran for the Senate. In the 1980s and 1990s, he served in different capacities for the Reagan and Bush administrations. But he may still be best known for having married Tricia Nixon, the daughter of the president, in a 1971 White House ceremony. What he has learned—starting with watching his father-in-law resign—is that it's crucial to put forward candidates who can do more than ride electoral waves (in or out).

Brendan Miniter is an assistant features editor at the Wall Street Journal.

What parties need to do, he says, is run candidates on specific ideas that will give them a mandate to enact real change. What's more, he sees New York as a vital battleground in the fight to repeal progressive policies that are bankrupting governments across the country. "The New Deal began here," he said. "What we do [in this state] matters and will be noticed."

His quest to find transformative candidates has placed Cox in a minefield. Though, to be fair, the first bomb to explode did so through no fault of his own, shortly after Cox became chairman. The party had nominated (without benefit of a primary) Assemblywoman Dede Scozzafava for a special election in the 23rd congressional district last November, notwithstanding her support for liberal policies such as card check, which would allow unions to organize workers without holding secret ballot elections.

Sarah Palin did a better job in gauging voter mood than local party officials when she endorsed Scozzafava's Conservative party opponent Doug Hoffman. Scozzafava was eventually driven from the race even as her supporters claimed the attacks on her

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were proof that the GOP was moving too far to the right to win competitive elections. That swipe generated a few headlines but missed what was really underway—the messy process of a party reshaping itself into a credible alternative to a progressive Democratic movement rising in Washington.

By the time it was over, just about every Republican in the state decided that never again would they be caught flatfooted with an uninspiring candidate. No more Scozzafavas.

This is where Cox comes in. For about a year, Republican Rick Lazio has been running for governor. He's a well-liked former congressman from Long Island who is best known for walking across the stage during a debate to confront Hillary Clinton in 2000 in his failed bid to beat her for a Senate seat. For about a decade he has been stumping for Republican candidates in New York. Now he hopes those efforts will translate into support for his race.

Only, they haven't. Or, at least, until very recently they haven't created the kind of support that would make Republican officials comfortable with his chances of success. Midway through January—the end of the latest reporting period—he had a mere $640,000 on hand for his campaign. The campaign hasn't released more up-to-date fundraising figures, mid-level GOP officials have complained that they haven't seen much of Lazio, and the word often applied to his bid for office has been "lackluster."

Steve Levy, right, with New York state Republican chairman Ed Cox

AP / STEVE JACOBS

Former Republican governor George Pataki endorsed him and is helping him raise money. Rudy Giuliani signed a fundraising letter for him. And Lazio has hit the trail to meet with more Republican officials. He's also won the support of Conservative party chairman Mike Long. That's a bigger deal than it sounds. No Republican has won statewide in 36 years without also winning the Conservative party's endorsement.

What has sparked Lazio's campaign seems to be Cox's endorsement of Steve Levy. Levy is a registered Democrat who is switching to the GOP. He's also the executive of Long Island's Suffolk County, an elected post that has given him experience managing a jurisdiction that has a larger population than several states, a record of closing a budget deficit by cutting spending, and a turn at tangling with public employee unions over personnel costs. At last count, he had $4.1 million stockpiled for his campaign.

The problem is that Levy waffled over whether to quit the Democratic party earlier this year and has a few things in his record to explain. Namely, he called the stimulus last year "manna from heaven," has supported universal health care as a way to reduce his county's Medicaid costs, and has supported Democrats up and down the ballot. The Lazio campaign uses these things to blast Levy as a liberal opportunist—a new Scozzafava.

So why endorse Levy? Cox gives an easy answer: "Competition is good—both candidates can get a chance to shine." And he gives a more personal one: "I didn't have to take this job" for the political experience. Instead, he said, he took it after Mississippi governor Haley Barbour told him the GOP needs strong state parties to win elections this fall. With few others volunteering, Cox jumped into the fray and concluded that Levy is a fiscal conservative who would bring energy to the race and, therefore, would be an asset to the party. With Levy running for governor, he says, "the excitement is all on our side."

Levy is still a long way from winning the GOP nomination. He trails Lazio in the latest Marist College poll 21 percent to 53 percent and will have to win 50 percent of the vote plus one among party officials at the Republican state convention in June just to get on the ballot to square off against Lazio in a September primary. Carl Paladino, a wealthy Buffalo developer, has also launched a campaign for governor that promises to target Levy.

But Cox is right when he insists that Levy is no Scozzafava. Unlike voters in the 23rd congressional district who had a nominee imposed on them by party insiders, Republicans now have a chance to figure out what Lazio and Levy stand for and how tough their candidacies are before their party settles on a nominee. ♦

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In Dodd We Trust?

The right way to do financial reform.

BY MATTHEW CONTINETTI

Not long ago, in September 2008, a lot of people thought the world was coming to an end. The economic crisis had brought global financial markets to a standstill, dried up lending, curbed international trade, accelerated the recession that began in December 2007, and produced the worst unemployment in decades. Democratic capitalism, the engine of the greatest increase in wealth and well-being in human history, had hit the shoals. There was a rush for the exits. It was every desk trader for himself.

How soon we forget. Today the economy is growing again. The latest job numbers are positive. Consumer spending is up. The president and Congress are preparing for the fall campaigns. The emergency is over.

But the financial system is not fundamentally better off than it was before. No CEO or regulator or politician has been held accountable. No rules have been changed, no regulations imposed to address the perverse misalignment of incentives that led big banks to gamble money they did not have and leave the American taxpayer to pick up the tab.

Sometime soon, the Senate will debate the Banking Committee's attempt to patch up the holes in the system. The proposed legislation is complex and unwieldy. It delegates too much decisionmaking to unelected bureaucrats. It does nothing to break apart the giant banks whose concentration of economic and political power is unfair and dangerous. It aggrandizes the Federal Reserve. And it could have the unintended consequence of perpetuating the same Too Big To Fail mentality that everyone but bankers wants to outgrow.

But these weaknesses do not mean that financial reform is unnecessary. To the contrary: In order for financial markets to behave properly and connect creditors with debtors efficiently, market participants need to be confident that government will enforce clear and simple rules in an equitable manner. Such confidence is missing. And while the banks may have repaid much of the money Americans spent to bail them out, the moral debt the bankers, regulators, and politicians owe to the people has not been repaid. No wonder we keep hearing it's angry out in the country. How does America profit when an ordinary citizen who plays by the rules looks up to see the powerful advancing their own interests without considering his?

The economic case for reform is plain. When the investment banks began failing in 2008, government did not know what to do. Some institutions were bailed out indirectly, by government-mandated private-sector takeovers; others, directly; and one, Lehman Brothers, went helplessly into bankruptcy. This hodge-podge approach created uncertainty, and uncertain markets are chaotic markets. It wasn't until the passage of the TARP bailout that the government could deal with the banks uniformly. TARP restored a measure of confidence and congruity to a system out of whack. But no one would tell you that it's a model for future crises.

What's needed is a playbook for the next meltdown. Start by establishing a procedure to unwind large and complex financial institutions on the brink of insolvency. The Dodd bill creates a new resolution authority financed by the banks. But a modernized bankruptcy code could do the same thing better, without creating a two-tier system of "systemically important" and "non-systemically important" institutions. Next, create an open and transparent exchange for derivatives. And what about a properly structured Consumer Financial Protection Agency, along the lines of the SEC and the Consumer Product Safety Commission, that would make sure the fine print in your credit card or mortgage contract isn't a ripoff?

The public correctly judges that elites have behaved irresponsibly. One way to address this concern is to constrict elite power. Scale back Fannie and Freddie. Withdraw from GM, AIG, and Citi. The bankers took on too much debt or leverage, so increase capital requirements while whittling down leverage ratios. That way the traders will find it harder to play with other people's money. And because a few big banks exert tremendous influence over the Treasury and Federal Reserve, why not break those banks up? A multiplicity of interests makes it harder for any one faction to dominate. Yes, bank-busting wouldn't end the threat of panics or bailouts. But it would disperse power, increase competition, and perhaps encourage local banking.

The thing to understand is that not every problem can be solved. Anyone who's read Kenneth Rogoff and Carmen Reinhart's *This Time Is Different* understands that financial crises are endemic to market societies. No planner or regulator or trader knows the future. Our ignorance is vast, and our ability to change behavior and culture is minimal. Financial innovation outpaces regulation. Market incumbents find ways to capture regulatory authorities. It's hubris to think that new rules won't produce unintended consequences or that none of those consequences will be negative. No reform will be truly effective if we lack modesty and humility and prudence. We've seen what happens when these bourgeois virtues are missing from commerce. And scorning those virtues in politics is no corrective at all. ♦

Matthew Continetti is associate editor of THE WEEKLY STANDARD.

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Celebrating William Stuntz

A gentleman-scholar at Harvard Law School.

BY ERIN SHELEY

Legal academia is not famous for collective displays of appreciation, and even less so for the humility of its members. So the celebration of the work of William Stuntz held at Harvard Law School on March 26 and 27 was doubly extraordinary. On those two days, legal scholars and practitioners from a range of philosophical and methodological perspectives came together to express their admiration for the work of a singularly modest man.

Professor Stuntz—an occasional contributor to this magazine—is credited with signal contributions to the fields of criminal law and criminal procedure. According to University of Pennsylvania law professor David Skeel, coauthor with Stuntz of the blog "Less than the Least" and an organizer and moderator of the event, "a lot of people used to think of criminal procedure as a backwater. One theme of the conference was how the field has really taken off thanks to Bill's work." Stuntz's attention to the "political economy" of criminal law—the relationship between the institutional arrangements of the criminal justice system and its outcomes—has "transformed the field," according to Richard McAdams of the University of Chicago Law School.

While a symposium examining the influence of a single scholar is not unheard of, such gatherings are rare. But Stuntz, who has suffered from acute chronic pain for years, is now also fighting cancer, and his meditations on faith, living, and dying on the blog have attracted a wide following. Thus, the Harvard conference, in addition to its focus on legal scholarship, was personal for its participants, many of whom were colleagues, mentors, former students, and scholarly interlocutors of Stuntz.

William Stuntz

PHIL FARNSWORTH

The first session addressed Stuntz's work on the problems caused by the structure of the criminal justice system. McAdams showed how legal scholars previously failed to examine the function of police, prosecutors, and other players in the system as "agents" of the citizens—a relationship that has been studied at length in the context of corporate law, with respect to executives and shareholders. Stuntz began to fill this gap. In his 2001 article "The Pathological Politics of Criminal Law," for example, he argued that the breadth and severity of criminal justice derives not from the electorate but from their agents, who are motivated by predominantly institutional politics. Particularly powerful, he argued, are the incentives, flowing from prosecutorial discretion, that motivate legislators to broaden liability rules, which in turn yields yet further prosecutorial discretion.

At the end of the first session, Stuntz highlighted three problems he believes contribute to massive over-incarceration and which merit further study. First, he noted the vertical allocation of power between state legislatures and local governments, where the former define criminal laws but do not oversee their enforcement, allowing local prosecutors and police departments free rein to pursue their own goals. Second, the horizontal allocation of power between police and prosecutors, with prosecutors exercising more control over the number of people who go to jail, which has risen despite the fall of the urban arrest rate in the 1990s. And third, the increasingly statutory nature of criminal law, which has obscured the considerations of a defendant's intent that once allowed for nuanced sentencing decisions under the common law, in favor of an increasingly strict liability system allowing less room for lesser punishments.

Another panel entitled "Emotion, Discretion, Mercy, and Faith" discussed the impact of Stuntz—an evangelical Christian who has blogged on the role of mercy in the law, though he has not addressed it directly in his scholarship—on the intersection of these controversial ideals in criminal law.

His Harvard colleague Carol Steiker, who has taken a particular interest in capital punishment, discussed Stuntz's notion of the "one way ratchet" in criminal justice—his insight that criminal liability is ever-widening, and sentences ever harsher, because of the political and other incentives of the actors in the system as it is currently configured. Steiker

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observes that the answer to this problem "should not be to limit discretion but rather . . . to have a normative discussion about good versus bad discretion, which is where the idea of mercy comes in." The concept of mercy, Steiker argues, offers a possible solution insofar as it invites consideration of "whether to punish when one has a choice."

Especially striking at the conference was the question of what it is that makes Stuntz's work so compelling to vastly disparate camps in the legal academy. David Sklansky of Berkeley, citing Orwell on Dickens, observed that "everyone wants to claim him." Stuntz's ideas resonate with Burkean skeptics who admire his acknowledgment of systemic complexity; with traditional liberals who appreciate his concern for over-incarceration and racial disparity in the criminal justice system; with "law & economics" scholars who value the empirical foundations of his work; and with law-and-order conservatives for his support of strong policing. McAdams says, "It is difficult to get academics to agree on anything, especially on politically charged matters such as criminal law and procedure. [Stuntz's] work is just so good—original, empirically grounded, and large-scale—that it defies preexisting categories and compels respect."

'It is difficult to get academics to agree on anything, especially on politically charged matters such as criminal law and procedure. [Stuntz's] work is just so good—original, empirically grounded, and large-scale—that it . . . compels respect.'

During his presentation Sklansky noted that Stuntz's work builds a bridge between the religious and the secular, the pragmatic and the evangelical, with his intellectual commitments both rooted in faith and insistent on reasoned evidence. In the world of criminal legal discourse, this is an invaluable contribution. Stuntz himself described the conference as dispelling a common misconception about the scholarly life as isolated. Scholarship, he says, is "actually done in the company of other people who have written; there is a conversation going on." The Harvard conference provided "a rare treat to have that conversation take place out loud."

Beyond Stuntz the scholar, however, the gathering was a homage to Stuntz the human being. It is significant that every single person invited came. After the three sessions on criminal law, a final session was devoted to reflections by mentors, colleagues, and students. Dana Mulhauser—an attorney at the Department of Justice and a former student of Stuntz's—noted the beauty of one of his famous phrases: "I hadn't thought of that."

"Think of how much he accomplishes with using that one phrase in the classroom," she said. "It manages to validate the person who had the unconventional idea, while at the same time conveying to the rest of the class, 'You don't have to put that in your outline.' Somehow, his students managed to come out of every conversation with him feeling like we were tenured Harvard professors, or could be, someday."

At the dinner for speakers on the first day of the event, U.S. Solicitor General Elena Kagan, former dean of Harvard Law School, ended her toast to Stuntz by saying, "Bill, I'm sorry for taking up so much of your time," a reference to his standard modest farewell to a colleague with whom he has initiated a conversation. When contacted for this article, Stuntz responded in character: "I am a little embarrassed because I don't believe my work merits this much attention, but I took a lot of pleasure in it as it allowed me to see and interact with old friends."

Not as much pleasure as they took in honoring so remarkable a man. ♦

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All the News That's Fit to Leak

The strange case of the 'New York Times' and the al Haramain Foundation

BY GABRIEL SCHOENFELD

Was the Bush administration's Terrorist Surveillance Program a violation of the 1978 Foreign Intelligence Surveillance Act (FISA), which forbids domestic wiretapping without a warrant? And was the *New York Times*'s decision to reveal the existence of the highly classified program, against warnings that it would gravely damage national security, an act of journalistic heroism and a powerful blow on behalf of civil liberties?

Affirmative answers to both questions have been the standard liberal line ever since the *Times* broke the story of the NSA wiretapping program in December 2005. With a verdict on March 31 in the al Haramain Islamic Foundation case, the *Times* is claiming a stamp of approval for its actions from the courts. In a thunderous editorial, the paper declared that federal judge Vaughn Walker's decision means that the NSA program was not only founded upon "spurious, often ludicrous, claims of national security" but that it was also flatly illegal: When the Bush administration, in investigating the terrorist ties of the al Haramain foundation, "failed to get a warrant to wiretap, it broke the law."

Yet the facts of the al Haramain litigation are not as uncomplicated as the *Times* would have it. They are a reminder both of the terrorist danger we face and our vulnerabilities as an open society trying to counter it. The episode is a classic example of lawfare, with a terrorist-supporting outfit turning the rule of law and due process against us.

After September 11, the al Haramain Islamic Foundation, a "charity" based in Saudi Arabia with branches in Afghanistan, Somalia, Pakistan, Nigeria, and a number of other equally disagreeable locales, was banned worldwide under the strictures of a U.N. Security Council resolution aimed at cutting off support for "al Qaeda, Osama bin Laden and/or the Taliban wherever located."

The Department of the Treasury deemed the U.S. branch a Specially Designated Global Terrorist Organization. Leaders of the foundation were placed on U.N. embargo lists. Whatever one makes of the case that came before Judge Walker, it is hard to see the al Haramain Islamic Foundation as anything other than a bad actor, a financial conduit for the worst of the worst.

But in our gloriously free country, the al Haramain Islamic Foundation enjoys rights, including the right to challenge its designation as a terrorist organization. It sued, and in 2004 in discovery proceedings, the Treasury Department mistakenly turned over a highly classified document making the foundation aware that it had been the object of government surveillance and evidently suggesting (the contents of the so-called "Sealed Document" remain sealed) that this may have been done without a warrant.

Attempting to correct Treasury's blunder, the Bush administration sought to have the case tossed out of court by invoking the state-secrets privilege, a rule that allows the government to avoid having to defend a case in which sensitive national-security information is placed at risk. Invocation of the state-secrets privilege can be an ugly legal move; when a case is terminated summarily on the say-so of the executive branch, justice can be capriciously sidestepped and denied. But in this instance, an appeals court panel reviewed the Sealed Document and found that "the basis for the privilege is exceptionally well documented" and that disclosure of "information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's capabilities and compromise national security." With the Sealed Document deemed inadmissible, the al Haramain foundation's challenge of its designation as a terrorist organization went nowhere.

But the appearance in December 2005 of the *Times* story about the NSA wiretapping paved a new avenue for its attorneys. Public sources were now, for the first time, becoming available that could help construct a *non*classified evidentiary basis that the U.S. government had engaged in surveillance outside of the FISA framework, opening the possibility that the government could be sued. Then in 2007 an FBI official confirmed (in a speech to the American Bankers Association that was posted on the FBI's website) that al Haramain had been surveilled (without specifying exactly by what means). From this lapse arose the claim against the U.S. government, alleging that the surveillance was warrantless and therefore trampled on an array of constitutional rights.

In ruling against the government and affirming this claim, Judge Walker relied on a straightforward logic: The plaintiffs had demonstrated that they had been wiretapped in a manner that required a warrant. The defendants, i.e., the government officials who had performed the surveillance, had declined to confirm or deny in court that they had obtained such a warrant and simply asked for the case to be dismissed. But the state-secrets privilege, ruled Judge Walker, could not be invoked in a way that made FISA "optional," employed as a means to

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evade "a statute enacted specifically to rein in and create a judicial check for executive-branch abuses of surveillance authority." It is this ruling that the *New York Times* is celebrating as a vindication of its disclosures: The NSA was operating lawlessly, found the court, and the *Times*, fulfilling a classic duty of a free press, brought the lawlessness to light.

But matters are hardly so simple. One point is that Judge Walker's refusal to allow the invocation of the state-secrets privilege is a wholly separate issue from whether FISA was violated. Pressing for dismissal under the state-secrets privilege, the Obama Justice Department, like its predecessor under George W. Bush, never felt it necessary to mount an argument touching upon the legality of the surveillance itself. Lacking any briefs from the government on the underlying issue, and relying only on the representations of the al Haramain attorneys, Judge Walker's ruling left the real questions swirling around NSA warrantless tapping and FISA unresolved.

One such question, which will be certain to figure prominently if the Obama administration appeals Walker's ruling, is the constitutional status of FISA itself—a matter that would likely require a Supreme Court decision to resolve. Although reasonable students of the issue come to different conclusions, presidents of both parties have consistently asserted the constitutionally derived prerogative for conducting foreign intelligence surveillance without a warrant. Indeed, at the time the FISA legislation was under consideration by Congress, President Carter's attorney general, Griffin Bell, put on record the executive branch's caveat that while the bill recognized "no inherent power of the president to conduct electronic surveillance," this lacuna "does not take away the power of the president under the Constitution" to engage in precisely such activity.

President Clinton did something parallel. His deputy attorney general, Jamie Gorelick, explained to the House intelligence committee that "the Department of Justice believes, and the case law supports, that the president has inherent authority to conduct warrantless physical searches for foreign intelligence purposes." In the Aldrich Ames spy case, they conducted such warrantless searches. When it comes to electronic surveillance, the same principle obtains.

For its part, the Bush Justice Department, after the *Times* broke the NSA story, issued a white paper noting that in matters of national security, the FISA statute was trumped by the "president's well-recognized inherent constitutional authority as commander in chief and sole organ for the nation in foreign affairs." It was this authority that extended to the conduct of "warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States."

What's Next for Health Care

By Thomas J. Donohue
President and CEO
U.S. Chamber of Commerce

Just days after health care legislation was signed into law, the president and congressional leaders launched an all-out public relations campaign to convince Americans that we should like what they did. It's going to be a hard sell. This $950 billion, 2,800-page bill fails to fix what's broken and risks breaking what works.

Requiring insurance companies and employers that provide health coverage for their employees to add a host of new benefits may sound good. But it will also drive up premiums.

Requiring small businesses to provide insurance that they cannot afford—or else pay steep fines—will eliminate jobs.

Requiring states—which are already running huge deficits—to add millions of new enrollees to Medicaid will lead to tax increases and program cuts.

Raising taxes by $569 billion as the nation grapples with nearly 10% unemployment and struggles to emerge from a deep recession is an affront to economic common sense.

Much has been made of the Congressional Budget Office's estimate that this legislation will reduce the federal deficit. But supporters of the bill engineered this response by submitting unrealistic assumptions regarding future Medicare savings and by ignoring an expected increase in Medicare physician reimbursements. Future Congresses are unlikely to make good on the cuts and even some of the taxes anticipated in this bill. Thus, its true cost will be closer to $2 trillion at a time when the nation is already drowning in red ink. Bankrupting our children's future is just not right!

Glitches in the new bill are already popping up. The sweetheart deals that were cut to secure the last votes in the House are coming to light. More than a dozen states have filed legal challenges. The Senate already spent a week debating changes to the original bill. This is what happens when you rush and ram through such a sweeping piece of legislation.

So what happens next? While some discuss repeal, the U.S. Chamber believes that a more effective approach is to work through all available and appropriate avenues—regulatory, legislative, legal, and political—to fix the bill's flaws and minimize its harmful impacts.

We will strongly encourage citizens to hold their elected officials accountable when they vote this November. And we will continue to promote real health care reform that curbs costs, reins in frivolous lawsuits, expands consumer choice, and removes the heavy hand of government from decisions that should be made by doctors and patients.

Like it or not, the health care debate is not over. Stay tuned!

U.S. Chamber of Commerce Comment at www.chamberpost.com.

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And finally, there is Barack Obama. As he campaigned for the presidency in 2008, he pledged never to engage in "wiretaps without warrants." To drive the point home, Obama promised to filibuster any bill that gave telecommunications companies retroactive immunity for cooperating with the NSA's counterterrorism program. But that same year, Congress—by then under Democratic control and wrestling with the exigencies of national defense—voted to authorize such wiretapping. Senator Obama did not filibuster the bill as he had promised. Indeed, in one of the more notable flip-flops of the general-election campaign, he voted for it, notwithstanding the retroactive immunity it conferred on the telecoms.

Thanks to that legislation, the Obama administration continues to engage in warrantless wiretapping on American soil, confining itself, precisely as the Bush administration did, to those cases in which one of the parties in a conversation or email is an al Qaeda suspect communicating across our borders. The *New York Times*, for its part, continues to denounce such wiretapping in extravagant language even though it has the blessing of President Obama and Congress.

But in celebrating Judge Walker's opinion, the *Times* is on treacherous ground: To justify its own questionable conduct, it is picking and choosing federal district court judgments like so many cherries. The paper scrupulously avoids noting, for instance, a 2006 ruling by federal district court judge T.S. Ellis III, who sentenced a Pentagon official named Lawrence Franklin to a long prison term (subsequently reduced to parole and ten months of community confinement) for leaking secrets of a kind far less sensitive than what the *New York Times* broadcast to al Qaeda and the entire world.

In sentencing Franklin to prison, Judge Ellis was explicit about the reach of the laws protecting secrets, leaving no doubt that reporters and editors fall within their ambit. "Where you ran afoul," he said to Franklin from the bench,

> is arrogating to yourself the decision whether to comply with the law. . . . That's not open to Americans. . . . *All persons* who have authorized possession of classified information, and persons who have *unauthorized* possession, who come into possession in an unauthorized way of classified information, must abide by the law. . . . So that applies to academics, lawyers, *journalists*, professors, whatever. They are not privileged to disobey the laws, because we are a country that respects the rule of law. [emphasis added]

We are indeed a country that respects the rule of law. We go to extraordinary lengths to protect the rights of even those, like the al Haramain Islamic Foundation, who would do us harm. The irony is that in this instance the case can be made that it was not the Bush administration but the *New York Times* that, in publishing some of our country's most precious secrets, became the party that trampled on the rule of law. This, more than anything else, may explain the remarkable fervor with which our country's leading newspaper has sought to vindicate the rights of the Specially Designated Global Terrorist Organization known as the al Haramain Islamic Foundation. ♦

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Kate Walsh wants to get sea turtles off the hook.

Do you?

Kate Walsh participates in leatherback sea turtle conservation in St. Croix. Photo © Tim Calver

1.4 billion fishing hooks and other gear catch hundreds of thousands of sea turtles every year. And many beaches are now unsuitable for nesting. Every species in U.S. waters is at risk of extinction. That's why we need to do something now. Join Kate Walsh and Oceana and help get sea turtles off the hook.

Oceana.org/turtlesoffthehook

OCEANA

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Nudge Nudge, Wink Wink

Behavioral economics—the governing theory of Obama's nanny state

By Andrew Ferguson

Among the many transformative experiences President Obama says he has planned for us, one in particular has gone relatively unnoticed. He has vowed to remake the methods by which the federal government regulates our homes, our offices, our roads and brooms and thimbles, our roller skates and garden tools and tortilla chips and sunglasses—nearly everything. The federal government regulates nearly everything already, of course, but now the new administration wants to regulate by different lights. A few days after taking office last year, Obama signed a presidential memorandum to set our new transformative experience in motion.

The memorandum began by noting that federal regulatory policy has lately been governed by an executive order issued in 1993. Political activists disliked the old order—EO 12866, as it's known among regulation buffs—because they saw it as a hindrance to new and ever more sweeping regulations. EO 12866 made the job of regulating difficult by requiring a federal agency to perform onerous cost-benefit analyses on each regulation it proposed and to rework the rules that proved too costly. In his memorandum, the president suggested that this approach, while perhaps well-meaning, was the product of a less sophisticated, pre-Obama era.

"A great deal has been learned since that time," he wrote. "Far more is now known about regulation—not only about when it is justified, but also about what works and what does not. . . . In this time of fundamental transformation, that process—and the principles governing regulation in general—should be revisited."

President Obama didn't do away with the cost-benefit requirement, or with Executive Order 12866. Instead he kicked the can down the road, as he likes to say other people are always doing. He ordered the Office of Management and Budget to conduct a 100-day review of 12866 and report back to him. Among other things, he wanted the report to "clarify the role of the behavioral sciences in formulating regulatory policy."

At this reference a few knowing observers pricked up their ears. During his campaign, the candidate Obama was often portrayed as an intellectual acolyte of "behavioral economics," a *très chic* social science that culls up-to-the-minute laboratory research about why human beings behave the way they do and applies it to the world of buying, selling, borrowing, and investing. At the candidate's elbow, said *Time* magazine, was a "behavioral dream team": economists and psychologists steeped in the latest behavioral literature. And once in office the president surrounded himself with many dream-team veterans: Lawrence Summers, Austan Goolsbee, Peter Orszag—behavioralists all.

He also appointed Cass Sunstein, a former colleague from the University of Chicago Law School, to be his "regulation czar" (journalese for the director of the Office of Information and Regulatory Affairs in the Office of Management and Budget). Being DOIRA of OMB may not sound glamorous—it sounds more like a sinister potentate in *Lord of the Rings*—but it is easily the most powerful regulatory position in the executive branch, after the president's. Every significant rule proposed by every federal agency must win the approval of Sunstein's office, which is now staffed with still more behavioral economists recruited from Harvard, MIT, Princeton, and the Brookings Institution. It's like behavioral summer camp over there.

"Relying on behavioral science," *Time* announced, Obama and "his administration [are] using it to try to transform the country."

It's harder than it looks.

Andrew Ferguson is a senior editor at The Weekly Standard.

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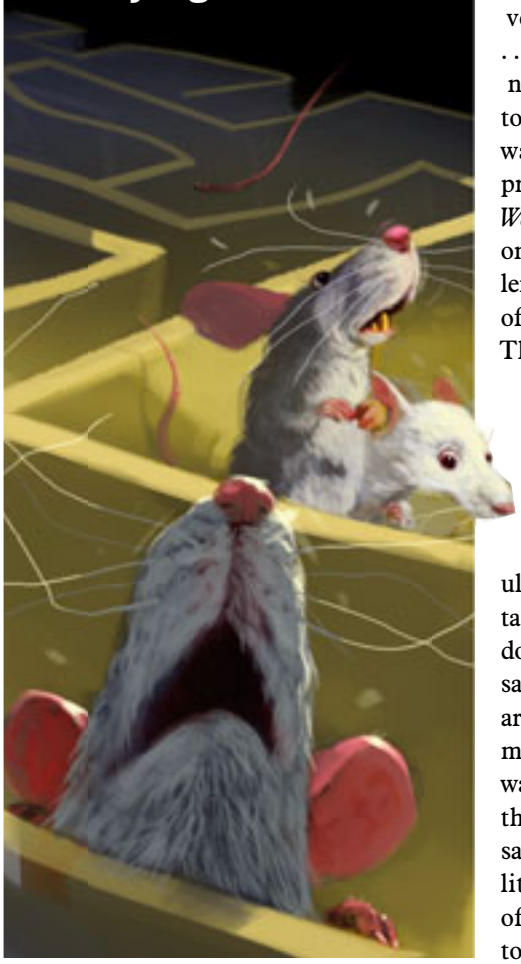
Behavioral economics—the idea of it, anyway—is a great help to President Obama in his efforts to define himself as a man too complicated and thoughtful to fit the categories of conventional politics. As a candidate he identified himself as an admiring reader of *Nudge*, a bestseller written by Sunstein and Richard Thaler, another Chicago economist who is often considered the founder of behavioral economics. *Nudge* was behavioral economics' popular manifesto, a guide, for policymaker and citizen alike, to "improving decisions about health, wealth, and happiness." *Nudge* became a big bestseller, predictably enough, for it was another in a long train of books—the *Wisdom of Crowds*, *Freakonomics*, *Sway*, *Wikinomics*, *The Black Swan*, the entire oeuvre of *New Yorker* writer Malcolm Gladwell—that claim to scour the arcane literature of social science and then cleverly apply its findings to everyday life, in ways that the wealthy white people who buy books find flattering, reassuring, amusing, and provocative. But not too provocative.

In *Nudge*, Thaler says, he and Sunstein drew on behavioral economics to create a "philosophy that was beyond left and right." They call it "libertarian paternalism," also "soft paternalism." It's *libertarian* (and soft) because it forswears government mandates wherever possible. It's *paternalistic* because it wants government to "nudge" citizens into behaving in ways that policymakers prefer. Thaler and Sunstein know that libertarians find their philosophy too paternalistic and paternalists find it too libertarian, and that's just fine with them. They cast libertarian paternalism as the *via media*, the third way, moderate and reasonable, avoiding political extremes and the snares of ideology. It's Gergenism for the thinking man. The oxymoron, joining two incompatibles, perfectly encapsulates the promise of Obama himself: something fresh, exciting, and highly improbable.

Just as Obama is a liberal Democrat who, his admirers insist, isn't really a liberal Democrat, behavioral economics proposes government regulation that, behavioral economists insist, isn't really regulation.



Obama's courtiers in the press, hungry for hints of their man's moderation, have been happy to oblige the oxymoron. When Sunstein announced that Obama wasn't "an old style Democrat who's excited about regulations for their own sake," the *New Republic* pointed out, Pavlov-style, that Obama was a New Kind of Democrat—newer than the last New Kind of Democrat, Bill Clinton, and newer certainly than Michael Dukakis, an older New Kind of Democrat who inherited the title from an even earlier New Kind of Democrat, Gary Hart. (You have to go all the way back to poor Walter Mondale to find an Old Kind of Democrat, and even he was preceded by Jimmy Carter, himself a very old New Kind of Democrat circa 1976.)

"Obama has no intention of changing the nature of American capitalism," the *New Republic* reporters insisted. He didn't have to, with behavioral economics at hand. "His program doesn't set out to reinvent whole sectors of the economy. . . . Unlike postwar liberals, he has no zeal for ramping up the regulatory state." Instead, they said, he was a "nudge-ocrat," who would preside over a "nudge-ocracy." The *Wall Street Journal* proclaimed the onset of the "nudge state," and Thaler declared that Sunstein, as DOIRA of OMB, would be "nudger-in-chief." The word play went on and on.

Just as Obama is a liberal Democrat who, his admirers insist, isn't really a liberal Democrat, behavioral economics proposes government regulation that, behavioral economists insist, isn't really regulation. Under the influence of libertarian paternalism, regulators abandon their old roles as mini-commissars and become "choice architects," arranging the everyday choices that members of the public face in such a way that they'll naturally do the right thing—eat well, conserve energy, save more, drive safely, floss. In the literature the unavoidable example of this involves cafeteria food. Customers in line are more likely to

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choose food displayed at eye level; this concept, called "salience," comes to us from behavioral science lab work. A wised-up cafeteria operator who wants his customers to eat healthier foods—at a high school, for example—will give prominent place to fresh fruits in the dessert line and push the Boston Cream Pie to the back. The kids won't be *forced* to choose the fruit; the pie will still be there, if their pudgy little arms can reach it.

Look what happens next. Behavioral economics tells us that fruit consumption will surge, because the choice architect has nudged the customers—not forced them!—into making the healthy choice.

A more substantial instance of behavioral economics in action has to do with 401(k) savings plans. If an employer simply offers employees the plan, allowing them to choose to opt in or opt out, most of them, under the power of inertia, won't bother to enroll, even though the 401(k) clearly works to their advantage. Yet all they need is a good nudge to save them from their bovine lassitude. Employers can reverse the default choice and automatically enroll them in the plan. Now lazy people who do nothing find themselves with a 401(k); those alert employees who don't want to participate can actively choose to opt out, though behavioral economics says that few will do so. Thus the savings pile up and futures brighten, and none of these indolent but suddenly happy people will even know they've been nudged.

The premise of behavioral economics is "predictable irrationality." (Another catchphrase—you have to get used to them.) We all know we do dumb things. But the behavioralists say they've discovered that we do dumb things systematically; we act against our own best interest (eating pie, failing to save for the future) with a consistency that smart people can observe, catalogue, anticipate, and exploit. If you as choice architect, for example, know about the "status quo bias"—people are disinclined to alter their immediate circumstances even in the face of a clear long-term benefit—you'll switch the default option on the 401(k). A list of the irrational quirks, or cognitive biases, that behavioral science claims to have uncovered would be endless. In addition to status quo bias, there's delusional optimism, loss aversion, the representativeness heuristic, the law of small numbers, disaster myopia, the availability heuristic, the planning fallacy, the mere-measurement effect, the mere-exposure effect, even the "yeah, whatever heuristic," so named by Sunstein and Thaler, who have a bias for whimsy, often fatal.

This grounding in the real world, confirmed by social science, is supposed to make behavioral economics superior to traditional economics as a guide to regulating human activity. Traditional economics—rational choice economics, or neoclassical economics—gets a rough going over from behavioral economists. By their reading, its gravest error is to accept *homo economicus*, the notion that man is a rational economic actor who is acting always and everywhere in his own best interest, however conceived. Traditional economists don't really believe this, at least not with the dogmatic insistence they're accused of, but pretending that they do allows behavioral economists to position themselves as hard-headed realists trying to correct the airy abstractions of out-of-touch dreamers—a clever reversal of the cliché that usually makes liberals out to be the softies and right-wingers the no-nonsense types. Behavioral economics, wrote a smitten correspondent for the *New York Times*, "is the study of everyday life as it actually happens, not as some textbook says it should."

It's been 15 months now since behavioral economics was enthroned as the administration's reigning regulatory philosophy. If it does indeed break with a century of conventional wisdom in economics, as its partisans claim, then we should be seeing its effects already.

"It's all over the place," Thaler told me. "It's hard to find a domain where you don't see aspects of this way of doing things." He mentioned a recent proposal to require all employers to enroll their employees automatically in retirement accounts, drawing on the opt-out model championed in *Nudge*. The nudge given to employees, however, comes only after Congress levels an unnudgey mandate on employers. Thaler also pointed to Michelle Obama's public campaign against obesity, in which she has delivered stern lectures to grocers, food processors, parents, and schools about how fat their customers, kids, and students are. Yet Mrs. Obama's pestering is just an example of the bully pulpit—government officials and first ladies have never required behavioral science to pound the podium.

Sunstein himself, in an OMB report issued earlier this year, listed several administration proposals that had been touched by the insights of behavioral economics. One would build on the behavioralists' notion of "social norms": "Individual behavior is much influenced by the perceived behavior of other people." So President Obama issued an executive order that banned texting in government cars, "to help promote a norm" that would discourage private citizens from driving while distracted. The Family Smoking Prevention and Tobacco Control Act of 2009 required that warnings on cigarette packages be greatly enlarged and simplified—another insight based on the behavioral concept of salience, which tells us that people pay more attention to images that are hard to ignore. And when the administration designed the 2009 "middle-class tax cut," it hearkened again to the wisdom of behavioral science: Experiments proved that taxpayers would be

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more likely to spend the extra money if it was dispensed in increments, through adjustments in paycheck withholding, than if it came in a lump sum, as a rebate.

Some with high hopes have found these small-bore results unexpectedly disappointing. Only a year after heralding the invention of the "nudge state," the *Wall Street Journal*'s economics writer followed up this March with a story headlined "Economic Policy 'Nudge' Gives Way to 'Shove.'"

"Some of the biggest proposals of last year have disappeared without a trace," the reporter wrote. In financial reform, for example, the Treasury Department had proposed requiring mortgage lenders and credit card companies to offer "plain vanilla" contracts—another idea popularized by *Nudge*—written in simple language and providing straightforward terms free of fine print. Those proposals have been shelved. Yet the *Journal* article quoted administration officials who insisted that behavioral economics was still alive. They cited a plan to give cut-rate loans or tax incentives to landlords to encourage them to upgrade their properties with energy efficient appliances. Once again, though, the influence of the behavioralists is hard to credit. Such a proposal operates according to traditional economics—landlords will rationally pursue their economic self-interest by grabbing a tax break—rather than to the "predictable irrationality" that the behavioralists believe they can correct through regulation.

In the grander areas of public policy, in the environment, financial reform, and health care, the administration's hoped-for libertarian paternalism is nowhere to be found. In place of gentle pokes and prods and nudges, the administration is hoping to levy taxes and bans, impose mandates and caps, set prices and restrain trade to make people behave properly—all the command-and-control methods from the Old Kind of Democrats' handbook. Removed from the nurturing environment of the university, soft paternalism stiffens up considerably.

The behavioralists are often caught smuggling in a normative and political judgment under the cloak of disinterested science. A hidden assumption is easy to conceal because the science that the behavioral economists draw upon is highly elastic, not to say flimsy.

What's happened? It's not yet clear how pertinent the science of behavioral economics is to the real world, even though the real world is supposed to be its specialty, as the *Times* man said. Certainly it shows no advantage in predictive power. No behavioral models foresaw the fiscal collapse of 2008; behavioral economists were as surprised as traditional economists when the housing bubble went pffft. Projecting their principles into the future, behavioral economists can be as goofy as the rest of us. Like many Americans, many behavioralists were against President Bush's surge in Iraq in 2007. Unlike many Americans, however, the behavioralists could pretend that their skepticism was rooted in science rather than political disposition.

As the surge was being debated, the behavioralist Daniel Kahneman published an essay that was intended as a rebuke to Bush's warmongering. Kahneman pointed to "several well-known laboratory demonstrations" proving that "hawkish beliefs and preferences . . . [are] built into the fabric of the human mind" and hence not entirely rational. A hawk's irrationality takes many forms, upon each of which the behavioralists have bestowed a complicated name. He mentioned "reactive devaluation" and "illusion of control" and "the fundamental attribution error" and much else. Unchecked, these cognitive biases might lead a nation, or at least its leader, to escalate a war foolishly, based upon nothing but reptilian instinct.

In hindsight, of course, Bush's decision doesn't look irrational at all. And it didn't seem irrational to

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lots of reasonable people at the time. Kahneman's decision to cast the prudential question of the surge as a contest between reasonable science and blind biological urge was silly at best, sinister at worst.

Aside from being wrong—and unreasonable, to boot—the Kahneman essay illustrated one of the salient tendencies among behavioral economists. Their definition of "irrational" is slippery. It can apply to any opinion or style of behavior they disagree with on political grounds. Consider the landlord initiative mentioned above. It's telling that the Obama regulators consider this a case for behavioral economics. If a landlord chooses to waste energy with inefficient appliances, traditional economics would give him the benefit of the doubt and search for reasons why he might do that. His rationality, that is, would be assumed. But the Obama regulators presume the landlord's behavior is irrational and ripe for a correction based on their behavioral insights. And why is the landlord being irrational? Because wasting energy has social effects (global warming, increased dependence on foreign oil, and so on) that the behavioralists dislike and the landlord discounts. Such behavior, in their view, is irrational on its face, the symptom of a cognitive bias—"myopia," maybe, or the "endowment effect."

'Behavioral economics,' Thaler likes to say, 'is the study of humans in markets.' Actually, it's the study of college kids in psych labs.

The behavioralists are often caught smuggling in a normative and political judgment under the cloak of disinterested science. A hidden assumption is easy to conceal because the science that the behavioral economists draw upon is highly elastic, not to say flimsy. One cognitive bias that the behavioralists don't mention, though its lure seems irresistible, is the bias that makes human beings swallow uncritically the declarations of social science. The bias deters the layman from snooping around to see if the science makes sense. This is the well-established "chump effect," a name I just made up. It accounts for the breathless reception given to the books by Gladwell and the other popularizers of sociological and psychological research. "Findings reveal . . ." "Scientists have uncovered . . ." "Research has shown that . . ." And we swoon.

But what does "research show"? What do "findings reveal"? Usually much less than the behavioral economists want to believe. And they do want to believe. They burrow through stacks of boring journals and come upon an article describing a new experiment with a deliciously provocative conclusion and looking up from the page they can hear the cry: "Generalize me, big boy! Make me *relevant*!" Skepticism flies off, and the economists never stop to consider the fishy process by which those provocative conclusions were reached.

The vast majority come from behavioral experiments that are completely artificial in their construction. Most take place in labs at elite universities, where graduate students and professors pay undergraduates a pittance to sit for varying periods of time and fill out questionnaires of varying length. Sometimes the subjects are asked to interact while the grad students watch them, other times the questionnaires alone suffice to produce the data. "Behavioral economics," Thaler likes to say, "is the study of humans in markets." Actually, it's the study of college kids in psych labs.

An example: In his recent OMB report, Sunstein insists that regulators take account of a cognitive bias called "probability neglect" in finding ways to impose their soft paternalism. Probability neglect is defined like this: "When emotions are strongly felt, people may focus on the outcome and not on the probability that it will occur." Which is to say, when you really want something you tend to be unrealistic about your chances of getting it. Surely that's true for all of us sometimes, and always true for some of us. But is it a universal pattern of behavior, one reliable enough to enshrine in a one-size-fits-all government regulation?

Who knows? Behavioral economists trace their detailed understanding of probability neglect to a study from 2001. In three separate experiments, a pair of graduate students from the University of Chicago Business School asked undergraduates from Chicago and Rice University to complete questionnaires. The 40 students from Rice, in Texas, were asked whether they would prefer to receive $50 in cash or "the opportunity to meet and kiss your favorite movie star." The methodological details aren't worth describing here—we can stipulate that the experiments were conducted with the utmost rigor and elegance. What's notable is that the experiments were thereafter assumed by social scientists to have established "probability neglect" as a consistent principle guiding human behavior in the marketplace. All thanks to 40 kids from Texas, filling out a form in 2001.

Likewise, when administration officials designed the 2009 tax cut—delivered by withholding less from paychecks instead of by making single lump payments to taxpayers—they were operating on the basis of another U.C. study. Two researchers brought undergraduates to a lab and handed each $50. Half the students were told the extra money was a "tuition rebate," the other that it was a "bonus." The experimenters followed up with questions by email a week later. The bonus group spent more money

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than the rebate group. From this result the administration felt confident in predicting how 140 million taxpayers would spend their tax cut. No one knows whether it was more effective in increments than it would have been in lump payments, of course; the tax cut was too small to trace in an economy so vast. It probably wouldn't have worked either way. But at least the administration had an experiment on its side.

Asked about behavioral economics in an interview recently, the neoclassical economist Gary Becker summed up his reservations. "There is a heck of a difference between demonstrating something in a laboratory, in experiments, even highly sophisticated experiments, and showing that they are important in the marketplace," he said. "Economics theory is not about how people act in experiments, but how they act in markets."

Other prominent skeptics, among them Joshua Wright of George Mason Law School and Gregory Mitchell of the University of Virginia, have begun dismantling the behavioralists' conceit more systematically. "Even if you discover a real cognitive bias," Wright said last month, "there will be a good deal of variation within the population, based on cognitive ability and personality traits. And if the bias varies from person to person, you can't assume that the bias will just 'scale up,' in a generalized way, when it's in the marketplace. Thaler and Sunstein will take a single study of a hundred Duke undergrads and say, 'Here's what we found—and here are the public policy implications.' That's not scientific. That's just sloppy."

Mitchell cut even deeper. He has discovered what he calls a "citation bias within psychology that favors pessimistic accounts of decision making." Experiments designed to demonstrate irrationality tend to find it. Even the most ingenious experiment can't replicate how individuals behave in the real world. We change and adapt over the course of months and years, reflect and learn, and call on the help of friends and family. These vital and unpredictable improvisations won't happen in the vacuum of the college psych lab, with a besmocked Ph.D. student hovering close by.

Behavioral economists deny any ideological intent in their work. The closest I've seen any of them come to conceding a political point of view was when Thaler, in a recent interview, said, "If there's a regulatory philosophy in behavioral economics, it's that we should recognize that people in the economy are human and that there are people out there trying to take advantage of them." In this sense, behavioral economics is just conventional 1960s liberalism—and conventional 1960s economics, too—that assumes the free market itself is a kind of unending con game, with the smart guys exploiting the saps. As an advocate for the market's hapless victims, the government has the responsibility to undo the con, a task that will require only the smartest administrators operating according to only the latest scientific research and making the most exquisite moral judgments.

You can see how useful the notion of irrational man is to a would-be regulator. It is less helpful to the rest of us, because it runs counter to every intuition a person has about himself. Nobody sees himself always as a boob, constantly misunderstanding his place in the world and the effect he has upon it. Surely the behavioral economists don't see themselves that way. Only rational people can police the irrationality of others according to the principles of an advanced scientific discipline. If the behavioralists were boobs too, their entire edifice would collapse from its own contradictions. Somebody's got to be smart enough to see how silly the rest of us are.

If the behavioralists were boobs too, their entire edifice would collapse. Somebody's got to be smart enough to see how silly the rest of us are.

Traditional economics has always been more modest. Assuming the rationality of man was a device that made the discipline possible. The alternative—irrational people behaving in irrational ways—would complicate the world beyond the possibility of understanding. But the modesty wasn't just epistemological. It was also a democratic impulse, a sign of neighborly deference. A regulator who always assumed that man was other than rational was inviting himself into a position where he could exert a control over his fellow citizens that wasn't proper for a true democrat. Self-government demands this deference. It won't work otherwise.

"Ultimately," the economist Brian Mannix wrote not long ago, "we insist that our regulators start from a presumption of rationality for the same reason that we insist that our criminal courts start from a presumption of innocence: not because the assumption is necessarily true, but because a government that proceeds from the opposite assumption is inevitably tyrannical."

Well, maybe not *inevitably*. Those behavioralists may be smart, but they're not quick. It's been 15 months since President Obama gave them 100 days to explain how to use behavioral economics in government regulation. They're still working on the report. ♦

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Our Nuclear Posture

Under the Obama administration? Supine.

By Michael Anton

During the course of the 1991 Gulf war, Iraq fired 88 Scud missiles at targets in Israel and Saudi Arabia. All of them were armed with conventional warheads. This despite the fact that Iraq then possessed large stocks of chemical and biological weapons. Indeed, after the war, U.N. chief weapons inspector Rolf Ekeus found that Iraq had armed 25 missile warheads and 166 bombs with biological weapons. None of them were used, even as the Iraqi military faced the overwhelming might of a U.S.-led international coalition in a war Iraq was sure to lose.

So what stayed Saddam Hussein's hand? As the Iraqis tell it, they feared an American nuclear response. They had reason to.

In the run up to the war, senior officials—from President George H.W. Bush on down—made a series of barely ambiguous and sufficiently ominous threats to Iraqi leaders. The president sent a letter to Saddam which informed the Iraqi tyrant that "the United States will not tolerate the use of chemical or biological weapons. . . . The American people would demand the strongest possible response. You and your country will pay a terrible price if you order unconscionable acts of this sort." Secretary of Defense Dick Cheney was equally blunt: "Were Saddam foolish enough to use weapons of mass destruction, the U.S. response would be absolutely overwhelming and it would be devastating."

The Iraqis took those threats seriously. Four years later, Iraqi foreign minister Tariq Aziz told Ekeus that Iraq had been deterred from using its WMD because it interpreted these (and other) American threats as promises of *nuclear* retaliation.

This episode is arguably the most successful example of deterrence in action in recent history. Could the United States repeat that performance if we had to? Not if we were to follow the letter of the Obama administration's 2010 Nuclear Posture Review, released (after many delays and much hype) last Tuesday.

Among the changes to American nuclear strategy announced in the review, the United States has now promised not to threaten or use nuclear weapons in response to a chemical or biological attack by a nonnuclear state. It is the worst element of a document that could in fact have been much worse.

The arms controlling left had high hopes for this report. Indeed, many of them—studded throughout the National Security Council staff, the State Department, and in civilian positions at the Pentagon—helped to draft it. But despite the numerous items on their extensive wish list, what they got were mostly stocking stuffers. They sought a pledge that the United States would never be the first to use nuclear weapons; a declaration that the "sole purpose" of the American nuclear arsenal is to deter nuclear attacks; elimination of one leg of the "strategic triad" of nuclear-armed ICBMs, SLBMs, and heavy bombers; a pledge to withdraw the few remaining forward deployed American nuclear weapons from Europe; "de-alerting" more of our nuclear forces—and this litany is by no means exhaustive. They got none of it.

Much of what they did get turns out to be something like a cheap, Canal Street knockoff of the object of their desire. Consider the pledge to renounce the use of nuclear weapons in response to biological threats. It is immediately followed by a caveat: "Given the catastrophic potential of biological weapons and the rapid pace of bio-technology development, the United States reserves the right to make any adjustment in the assurance that may be warranted by the evolution and proliferation of the biological weapons threat and U.S. capacities to counter that threat."

So will we or won't we? To say that the policy is now muddled would be an understatement. Who knew that Obama was a believer in strategic ambiguity?

This caveat pointedly does not apply to chemical weapons, however. Hence a repeat performance of our Gulf war deterrence of Saddam would seem to be off the table. Or is it? The Nuclear Posture Review for the first time links two formerly separate policies: "negative security assurances" (promises not to attack nonnuclear states with nuclear weapons) and implicit or explicit threats to wield nuclear weapons in response to nonnuclear attacks. The United States has always reserved the right to respond to conventional or chemical-biological warfare (CBW) attacks with nuclear weapons. Now, apparently, we won't even threaten a nuclear response to biological (unless we decide otherwise; see above) or chemical attacks if the attacker is

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a signatory to the Nuclear Nonproliferation Treaty in good standing. Got it?

Iraq signed the Nuclear Nonproliferation Treaty in the treaty's first year (1968); hence, had the new policy been in place at the time of the first Gulf war, we could not have made the threats that we actually did use to good effect. But wait! Was Iraq "in compliance with their nuclear nonproliferation obligations"? If not, then the assurance would not have applied. We now know, thanks to the war and the inspections that followed, that Iraq maintained a secret and extensive nuclear weapons program. We realized little of this before the war, when the threats were made. So would they have been allowed or not?

In any case, why the two concepts are now linked is not clear. One of the rationales for the United States' forswearing the development of biological and chemical weapons (apart from their inherent repugnance) was that our nuclear arsenal remained the surest guarantee against CBW attack. Well, not if we explicitly renounce the use of nuclear weapons in such circumstances.

Also, the point of the negative security assurance is to encourage regimes to live happily without nuclear weapons. This is not entirely fanciful. Tom Reed and Danny Stillman, in their history of nuclear weapons *The Nuclear Express*, tell how the reluctance of some of the former Soviet republics to return to Russia the legacy weapons of the USSR was overcome. Some Ukrainian generals were invited to StratCom headquarters in Omaha, Nebraska, whereAir Force brass, poring over maps of their guests' country, explained in vivid detail what it meant to be on the American target list in the event of nuclear war. The Ukrainian visitors turned white, returned to Kiev and recommended that all nuclear weapons in their country be repatriated to their motherland.

So, if promises not to use nukes against the nuclear-chaste encourages states to swear off nukes, how does promising not to use nukes against CBW-capable states discourage the development of the latter weapons? Wouldn't that rather encourage it? If the clear consequence of being nuclear-armed is to place your country on the American nuclear targeting list, why shouldn't the clear consequence of seeking, possessing, or using CBW not be the same?

No doubt the Obama officials who drafted this document believe that its many caveats, exceptions, and trapdoors leave sufficient flexibility for the president to do whatever he may think he needs to do in any contingency. And they may be right. But that misses a larger point. Deterrence is not always, or even mostly, effective in the midst of a crisis. It is also a function of an enemy's impression of how far its intended victim can be pushed, and how hard he might push back if pushed too far.

By that standard, the new policy is a failure. It amounts not so much to strategic ambiguity as to strategic obfuscation. The new policy is deliberately designed to sound softer than the old, but is also qualified to the point that the new softness will appear to any semi-careful reader to be highly questionable. What is the real policy? It's impossible to say simply from reading the report. What will an enemy take away from it? That we deeply desire to cultivate a reputation for dovishness while we reserve the right to revert to hawkishness at a moment's notice. Whom is this supposed to scare or impress, much less deter?

Thankfully, the truly bad news pretty much ends there, at least in the Nuclear Posture Review. There is however a bit of bad news in the New START treaty, the text of which was finally released after Thursday's Prague signing ceremony. The administration has repeatedly sworn that the treaty places no constraints on missile defense. Secretary of Defense Robert Gates: "Missile defense is not constrained by this treaty." Secretary of State Hillary Clinton: "The treaty places no constraints on our missile defense plans—now or in the future." Undersecretary of State Ellen Tauscher: "There is no limit or constraint on what the United States can do with its missile defense systems . . . definitely, positively, and no way, no how."

And yet, there is this in the treaty's preamble:

> Recognizing the existence of the interrelationship between strategic offensive arms and strategic defensive arms, that this interrelationship will become more important as strategic nuclear arms are reduced, and that current strategic defensive arms do not undermine the viability and effectiveness of the strategic offensive arms of the parties . . .

There are two possible ways to interpret this: (1) Who cares? It's just the preamble. (2) It is the first-ever formal linkage between offensive and defensive systems and an implicit promise to limit the latter in the future. Russian president Medvedev's foreign minister believes interpretation Number 2. "Linkage to missile defense is clearly spelled out in the accord and is legally binding," Sergei Lavrov said. He would appear to be at least partly right. The linkage is there for all to see, though it's a stretch to say that the preamble language is legally binding.

Linkage, however, is bad enough. For two decades, the United States has deliberately refrained from designing missile defense systems that could counter the Russian (or Chinese) nuclear arsenals. Moscow's response has been to unceasingly complain about a system deliberately limited so that their huge arsenal could easily overwhelm it. Now we have the worst of both worlds: a missile defense system designed not to defend against a Russian strike but nonetheless formally linked to Russia's nuclear posture. Worse, the Russian foreign minister has hinted that his country may invoke the treaty's otherwise standard withdrawal language if "the U.S. strategic missile defense begins to sig-

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nificantly affect the efficiency of Russian strategic nuclear forces." Given that the Russians publicly insist (though cannot possibly believe) that virtually anything we do on missile defense affects their strategic forces, this was not encouraging news.

It gets worse. Article V, paragraph 3:

> Each party shall not convert and shall not use ICBM launchers and SLBM launchers for placement of missile defense interceptors therein. Each party further shall not convert and shall not use launchers of missile defense interceptors for placement of ICBMs and SLBMs therein.

Now, this is a constraint. On its website, the White House asserts that "the Treaty does not contain any constraints on testing, development or deployment of current or planned U.S. missile defense programs." Possibly the administration could fall back on the "current or planned" qualifier to insist that, since we do not currently plan to reuse retired SLBM or ICBM launchers for missile defense, this limitation is not really limiting. But it might be. The treaty after all calls for steep cuts in delivery vehicles. Absent this provision, we might have reused those retired launchers in the missile defense program. The treaty forbids that. Expect this provision to cause serious problems in the ratification debate, and also to undermine—justifiably—the administration's credibility. Republican senators Jon Kyl and John McCain have already noticed: "While we were initially advised that the only reference to missile defense was in the preamble to the treaty, we now find that there are other references to missile defense, some of which could limit U.S. actions." Translation: We were misled.

In the Nuclear Posture Review, there is some good news, though one has to be willing to parse to find it. One of the marquee items on the arms controllers' wish list was a pledge not to develop any new nuclear weapons. Since the United States has been out of that business for more than 20 years, why make this a priority? The issue is the reliability of the existing stockpile. Nuclear weapons are complicated; the older they get, the less sure you can be that they still work. One way to know is to test them, but there is no appetite in this country to resume testing (which we unilaterally halted in 1992). Another option is to do what we are doing now: conduct an extensive maintenance program to identify problems and replace degraded components. But that doesn't yield certain knowledge; it only raises confidence.

Yet another way would be to make more warheads. That's what Secretary of Defense Robert Gates wanted to do when he was serving in the prior administration and reportedly still supports. It's also what every Republican senator plus Joe Lieberman says will be the price of ratification of the New START treaty.

But the Nuclear Posture Review emphatically says "the United States will not develop new nuclear warheads." Game over, right? Well, it depends on the meaning of "new." The approach favored by Gates—called the Reliable Replacement Warhead (RRW)—would use existing fissile material, parts stripped from decommissioned weapons, and design specifications that were developed decades ago. If a skilled mechanic were to build a car using spare parts, old steel, and blueprints from a 40-year-old file cabinet, would it be a new car? In one sense, yes. In another sense, no.

Arms controllers emphatically answer "Yes!" to that question. While it might appear that they have won the day, a careful reading reveals a few escape hatches. First, the document specifically renounces "new military missions" and "new military capabilities" for the arsenal. But that is like a Catholic ostentatiously pledging not to eat meat on Fridays during Lent. He has to do that anyway. Nobody is talking about building a new warhead for a new mission. The last time such a proposal was floated—the "Robust Nuclear Earth Penetrator" advocated in the 2001 Nuclear Posture Review—it was quickly scuttled owing to intense opposition. The mission of the RRW would be the same as the mission of the warheads in our current strategic arsenal. Moreover, the report specifically allows for the "replacement" of nuclear components—language malleable enough that it could be stretched to look a great deal like RRW.

At a press briefing at the Pentagon the day the report was released, National Nuclear Security Administration head Thomas D'Agostino and Joint Chiefs vice chairman General James Cartwright seemed to confirm this interpretation. Here is the general: "Nobody has ever removed from the commander or anyone else in that chain the ability to stand up and say, 'I'm uncomfortable; I believe that we're going to have to test, or I believe that we're going to have to build something new.' That's not been removed here." And D'Agostino: "So what we want to do is . . . create a position or a point in time where we say, if we have to go to that replacement category whereby—because we think it's the only way or one of the best ways, to achieve the aims that we have—safety, security, reliability, and no underground testing—then we have the flexibility to do that."

Ellen Tauscher, perhaps the most determined RRW opponent in the administration, stood by mute. So who really won that fight?

The answer would appear to be Gates. He is almost certainly the reason why the arms controllers lost so many key fights, and a living example that sometimes engaging with those with whom you disagree can make a bad policy better or at least less bad. Would that he could have saved us from the dismal policy of strategic obfuscation and the formal linkage of missile defense to Russian strategic forces. But it would be ungrateful to complain. At least about Gates. ♦

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A Crisis Republicans Should Not Waste

An Austen Chamberlain moment for the Democrats

By Hadley Arkes

The points of caution have already been noted by conservative commentators: The public anger over the passage of Obamacare may well subside by November, especially if the economy continues its healing. And so the Democrats, having desperately gone for broke, may be delivered from their danger and find themselves surviving with wreckage vast, yet not terminal.

But the tawdriness that attended the ramming through of Obamacare has had a mind-clearing effect for the public. Academics might find their surety in theories ever more inventive, but ordinary people, anchored in the world, trust in common sense: They cannot believe that their medical care will really be better when managed in the style of the Post Office or the IRS. They cannot believe that a new entitlement will lower costs and not raise taxes, that it will not lead to price-controls and rationing.

My own reckoning is that the passions of this season will endure: that the Hand of Justice will pass over the house of Democrats and leave very few standing. Even Democrats who voted against Obamacare will not be spared, for the public seems to have been brought to the threshold of a judgment so binary that the choices before us now require the sweeping away of any Democrat. A vote for any Democratic candidate is a vote to keep in power Pelosi and Reid and the rest of the people who imposed this scheme on us.

The current conflict may have brought us to one of those rare crises that produces a recasting, or realignment, of the political parties. At a similar moment, Margaret Thatcher destroyed Britain's Labour party as a socialist entity, forcing it to abandon its schemes, long cherished, for nationalizing major parts of the economy. And so it should not be beyond imagining that today a conservative leadership, with wit and nerve, could bring an end to the Democratic party as it was recast in the days of the Vietnam war and George McGovern. The election of 2008 swept the American left into power with swollen majorities. The Democratic leadership was emboldened enough to offer an unalloyed version of its politics: antiwar, suspicious of American interests abroad, weak on protecting the lives of Americans, antireligious, pro-abortion, pro-racial preferences, beholden to the whims of the plaintiff bar and the teachers' unions, and ever inclined to keep extending the reach of governmental controls and reducing the freedom of ordinary people to make their livings. These things have been revealed so clearly that it is not unthinkable that the public might be moved to do something decisive in November.

There's a suggestive analogy to our current situation: the crisis in British politics in 1923-24.

There had been a bruising general election in 1922. The Conservatives had won 344 seats, giving them

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more than the Liberal and Labour parties combined, but Prime Minister Stanley Baldwin sought a fresh mandate the next year to deal with the problem of unemployment by a return of protectionism. This policy brought the Liberal party to close ranks in support of free trade. The Liberal share of the House of Commons increased in the 1923 election from 62 to 158, and Labour surged too, from 142 to 191. The Conservatives fell to 258, still the dominant party, but no longer strong enough to form a government on their own.

There had not yet been in Britain a Labour government. The dread of bringing forth the first one was an incentive to form a coalition between the "constitutional parties"—i.e., the parties not threatening to change radically the powers and reach of the state. This view was held by the Conservative leadership, including the Tory statesman Austen Chamberlain—older half-brother of Neville Chamberlain. Some of them were actually willing to have the Conservatives take second place and support a Liberal government with H.H. Asquith returning as prime minister. But the Liberal recoil from the protectionism of the Conservatives was so pronounced that Asquith went the other way. The Liberals would back Labour and in that way install the first socialist government in Britain.

Austen Chamberlain saw with an uncommon clarity what this decision meant. Asquith, he said, "has taken his choice, and he has by that choice constituted his own immortality." For "he will go down to history as the last Prime Minister of a Liberal Administration. He has sung the swan song of the Liberal Party":

> When next the country is called upon for a decision, if it wants a Socialist Government it will vote for a Socialist; if it does not want a Socialist Government it will vote for a [Conservative].

It took but a short while to learn just how prophetic Chamberlain had been. The tensions within the new government forced a new election within a year. For the voters, the maze of issues faded against what Chamberlain had rightly seen as the momentous fact overriding everything else: socialism or not. With this stark choice before the public, the Conservatives surged to 412 seats, regaining their dominance. Labour fell to 151, but the Liberals sunk to the terminal condition of 40 seats. They had lost their place as one of the two major players among the parties in British politics. To this date there has not been another Liberal prime minister.

We could be at the threshold of a similar moment right now if the conservative leadership holds fast to its focus on repealing and replacing Obamacare. As Burke warned, refined policy is ever the parent of confusion. This is no time to be sorting through the provisions of medical care to see which ones might be salvaged. There will be time to piece things together later by building anew. The worst thing is to encourage people to get lost in the labyrinth of strands making up that bill of 2,000 pages. For the strands of complication recede when set against the takeover of a vast system that cannot possibly be grasped and administered under a system of command and control. The unforeseen consequences are already starting to dangle forth, with the changes in the liabilities of corporations. More of them will be coming, with more unsettling surprises, as the year proceeds. Let them come.

As Burke warned, refined policy is ever the parent of confusion. This is no time to be sorting through the provisions of health care reform to see which ones might be salvaged. For the strands of complication recede when set against the takeover of a vast system that cannot possibly be grasped and administered under a system of command and control.

For most of the public, this has been a rare moment in which people can see what is plainly before them. Yet some conservative commentators continue to harp about how "Republicans lost their way" when they showed themselves willing to spend lavishly in recent sessions of Congress. But Republicans found themselves working within the framework that Lyndon Johnson had helped to build, where there is no longer any sense of constitutional limits on the projects that the federal government can support. If the government is building housing in cities, funding clinics for birth control, and projects in the arts, what are Republican congressmen to do? Leave these projects to sustain and enrich only the liberals who invented them and who formed their main constituencies? Are conservatives supposed to be so uniformly high-minded, so detached from self-interest, that their supporters cannot be encouraged by the same patronage that Democrats have found enduringly helpful?

But put aside that record on spending, as grievous as

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it was at times. Was that really the only issue of moral consequence that was before the Congress when the Republicans were in power there?

Republicans were in control of the Congress when the Supreme Court made audacious—even revolutionary—moves to extend the power of judges to review the actions of the military on the battlefield. It is hardly conceivable that a Democratic Congress would have moved as quickly and decisively as the late Republican Congress to counter the courts. In *Rasul* v. *Bush* in 2004, the Supreme Court held that the basic statutory grant of habeas corpus would now be available to detainees held at Guantánamo Bay. The next year the Republican Congress acted to alter the statute and remove the jurisdiction for federal judges that the Court had proclaimed. Congress offered instead a limited review in the D.C. Circuit. In 2006, in *Hamdan* v. *Rumsfeld*, the Court invalidated the military commissions set up by President Bush to prosecute terrorists. But the Republican Congress swiftly enacted the Military Commissions Act. Then Congress reenacted and broadened the preclusion of habeas corpus. The Republicans voted for that measure, 219-7. The Democrats voted *against* it, 160-34.

Two years later the Court overturned the key parts of these legislative acts. The habeas jurisdiction would indeed be extended, and it would cover even the prisoners held *outside* the United States in Guantánamo. But now there was no longer a Republican Congress to challenge the Court. And without congressional support, the Bush administration lost its resolve to do what Attorney General Michael Mukasey urged be done: challenge Congress to provide guidelines and rules, rather than letting federal judges, armed with new power, make up the rules as they go along.

This move to enlarge the powers of the judges was nothing less than revolutionary, for it struck at the deepest principle planted in the American regime from the time of the Revolution: that the safety of the American people should not be left in the hands of officials—whether in the British Parliament or unelected courts—who bear no direct responsibility for the lives that are at stake. And yet, in the law schools and the Democratic party there is not the slightest hesitation to extend the power of judges in this way.

There has been a comparable determination to extend the control of the courts in putting over the parts of the liberal agenda that Democrats will not campaign for in public. Bill Clinton and Barack Obama as they ran for office would not discuss issues like gays in the military or same-sex marriage, but they happily put in place judges who in turn would override voters and constitutions in the states to install same-sex marriage. For a while, in the mid 1990s, there seemed to be a concert forming of state and federal courts to "nationalize" same-sex marriage. But the Republican Congress passed in 1996 the Defense of Marriage Act. It is one of the barriers standing in the way of same-sex marriage spreading from one state to all the others, and so it is no wonder that the desire to repeal that law has taken hold among the Democrats.

On the matter of abortion, it required a Republican Congress to pass the bill on partial-birth abortion—and to pass it twice, for it was blocked the first time with a veto by Bill Clinton. The vote was lopsided between the parties. In the House in 1995, the Republicans voted overwhelmingly for the ban, 215-15. The Democrats resisted a ban, 123-73. In the Senate, Republicans voted for the bill, 45-8; the Democrats voted against, 36-9. There were enough Democrats then to sustain a veto by Bill Clinton. It required a Republican president to sign that bill when it was passed again in 2003. When the bill passed the House, the Republicans voted for it, 218-4. The Democrats voted against it, 137-63.

It takes a special obtuseness, then, not to recognize what has been plain now for many years: The Republicans are in fact the conservative and pro-life party in our politics. Where else, after all, would we find the people who defend traditional marriage, fend off the regulations and taxes that discourage the creation of jobs, seek market solutions first to social problems, and let people keep more of what they earn? Where is one more likely to find the people who do not think that American interests abroad, or the American idea abroad, are tainted and suspect? For that matter, where is one more likely to find the people actually willing to take up arms and risk their lives in defense of the country? It is curious to claim that the Republican party has "lost its way" when the people who share these convictions have no trouble in finding their way to the party that provides, these days, their natural home.

It is part of the alchemy of political parties that they form the principles that hold them together as they reconcile the interests of the groups that are drawn to them in coalition. When there is a transfer of power then from one party to another, the shift is not random but patterned and principled. It's the shift from Michael Mukasey to Eric Holder, from Samuel Alito to Sonia Sotomayor. At a certain point this sharp difference becomes clear to the public in a manner that cannot be missed. And when it comes along with the sense that something critical hangs now on the choice, we should not be astonished if the people, in November, take the levers within their reach and do something astounding. ♦

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Tea partiers, Flagstaff, Arizona, 2009

JOSHUA LOTT / REUTERS / CORBIS

Liberty for All

Free speech is the American way

BY ELIZABETH POWERS

For James Madison, author of the Bill of Rights, "the People, not the Government, possess the absolute sovereignty." Freedom of speech and the press, the right to assemble and petition, set down in the First Amendment to the Constitution, were instruments by which the people would exercise "censorial power" over the government, not the other way around. What has been clear this past year, however, as protesters exercised their First Amendment right to oppose a government takeover of health care, was how little understood is the principle of popular sovereignty among the media—or, indeed, much of our governing class.

Popular sovereignty, as William Anderson recently wrote in these pages, distinguishes America from all other advanced countries and "stands with hardly a seconding voice throughout the contemporary international community." Paternalism, whether of a benevolent or a tyrannical sort, is laid down in the DNA of most governments, and the rest of the so-called West is no exception. While the press in Western Europe still functions as a check on government, individual citizens suffered from "democracy deficit" long before the European Union added flesh to that term. *Extreme Speech and Democracy* powerfully documents the differing assumptions of government in the United States and the rest of the world in regard to the issue of speech. Even the title of this book telegraphs the enduring problem that elites, the class that formulates government policy, have with the "people."

Extreme Speech and Democracy
edited by Ivan Hare and James Weinstein
Oxford, 500 pp., $175

Extreme Speech has its origin in a 2007 conference at Cambridge. Contributors include lawyers representing eight national legal traditions, with the majority from Great Britain, as well as "policy advisers," psychologists, a philosopher, and even one playwright. It contains several interesting tables, running to 20 tightly spaced pages, of free speech cases and legislation, both international and national, as well as a table of three pages of conventions and international instruments. Arab and African nations are parties to such conventions, but all the cases and legislation discussed here are products of democratic countries. Among the subjects treated are religious dress, Holocaust denial, racial hatred, disabilities, obesity, homophobia, xenophobia, and the

Elizabeth Powers is editing a collection of essays on the intellectual origins of freedom of speech in the 18th century.

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glorification of terrorism. (Nothing, however, on global warming skepticism.)

It may be the preponderance of lawyers among the contributors, but there is throughout a certain obfuscation—think the guarded equivocations of our Lawyer-in-Chief—even on what constitutes "extreme speech" or "hate speech." Does it include only racial epithets and fighting words and the like; or are discussions of, say, the merits of affirmative action instances of speech that "stigmatize" minorities? *Extreme Speech and Democracy* is not exactly a ringing defense of free speech, much less speech of the extreme variety.

Interestingly, the Mohammed cartoons controversy of 2005-06, one of the major free speech issues of our time, is treated directly in only a single chapter. The controversy is of interest for revealing the fault line between our free speech jurisprudence and that of Europe. Justice Holmes's "clear and present danger" test of 1919—referring to convictions of war protesters during World War I—has long given way to laws hostile to regulating public discourse on the basis of the content expressed. Europe is a different story: The protests over the Mohammed cartoons were worldwide news; less well known is that Muslim groups in Denmark filed a complaint against the *Jyllands-Posten* for offenses committed under sections of the Danish criminal code concerning blasphemy or degradation with malice toward persons based on (among other things) race, color of skin, national or ethnic roots, or faith and sexual orientation.

Despite the right to freedom of expression contained in Article 10 of the European Convention on Human Rights and Fundamental Freedoms (which came into force in 1953), the European Court of Human Rights is also, according to Ivan Hare, a barrister at Blackstone Chambers in London, "the most comprehensive and developed system for supranational human rights protection." It protects, *inter alia*, the right to life; freedom from inhuman and degrading treatment or punishment; freedom from slavery and forced labor; and the right to education. Additional protocols have abolished the death penalty, provided protection for aliens, and established a "general prohibition on discrimination."

From the evidence of Hare's essay, which is eye-opening and stomach-turning at the same time, Europe is tied up in the procedural knots of protocols, conventions, directives, and frameworks addressing the evils of sexual discrimination, racism, xenophobia, and religious intolerance. So many enumerated rights naturally produce litigants, and since individuals may petition directly against their own national governments, cases at the full-time court in Strasbourg have grown from 138 in 1955 to over 41,000 in 2005. Remember the anti-Stalin jokes that landed people in the Gulag? The Stasi, with a quarter of the East German population on its payroll, couldn't silence the population with the efficiency or effectiveness of the European Court of Human Rights. Freedom of expression, even in the moderated form in which it exists in Article 10 (entailing "the protection of the reputation or rights of others"), is a joke.

In truth, hate speech is a bogus issue, representing not an attempt to reduce discrimination but a cynical instrument to muzzle criticism of the failures of half a century of quasi-socialistic government programming.

The United States is not immune to this trend to suppress "offensive" speech, and the views represented in *Extreme Speech* reflect interpretive battles that have been going on here since at least the early 1980s. These battles pit so-called critical legal scholars (Steven Heyman and, more famously, Catharine MacKinnon, who is not represented in *Extreme Speech*) against defenders of what this legal movement refers to as "First Amendment ideologues" (represented with a robust First Amendment defense by Ronald Dworkin). Viewing law as serving the interests of the powerful, these critics of an expansive reading of the First Amendment ground their demand for restrictions in a provision of the Fourteenth Amendment concerning "equal protection of the laws." Liberal constitutions, they complain, have not reduced social inequality.

Of course, Stalin had tons of power, could murder his opponents—and he still couldn't get socialism to work. Socialism, however, remains one of those vampires (like anti-Semitism) that refuses to die: Despite its past failures, each generation believes it can do it right this time around. Thus, the essays here that favor restrictions on speech and the media refer to the disempowered, to hegemonic elites, democratic legitimacy, collective defamation, asymmetry of power, and so on. They speak of the "need" to "redefine" liberal democracy; for the state to guarantee a minimal standard of protection for vulnerable minorities against "organized" racists; for "cultural policy which would build capacity within minority communities." Stomach-turning Orwellian doublespeak, yet all too familiar.

The legal scholar referred to most frequently here is Robert Post, who was appointed dean of the Yale Law School last June. His chapter begins with a certain literary flair, quoting Charles William Eliot and even Barry Goldwater ("Extremism in the defense of liberty is no vice") on the place of extreme emotions in society. But he, too, is ultimately evasive. He asks, for instance (without giving an answer), whether speech "attacking Islamic fundamentalism for its homophobia and suppression of women [is] hate speech or critique?" He would not have us believe that "simple disagreement can be taken as conclusive evidence of extremism or hatred," but will only go so far as to say that we "moderns" are embarrassed by such a notion.

Dean Post is known to be a "liberal" on the First Amendment, but his views show the social and antidemocratic mischief produced by the issue of hate

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speech. His subject is the conjunction between freedom of speech and "ambient social norms," the "group attitudes that we all carry around in us all the time and that form the foundation and possibility of our very 'selves.'" Fair enough—and, as he writes, norms do evolve, and yes, they are contestable. It is also the case that schools and the law "offer authoritative interpretations of norms." As evidence of how norms evolve, however, he makes a misleading analogy, comparing earlier laws against blasphemy with hate speech regulation, as exemplifying "the aspiration of law *to enforce norms that it regards as especially important* for community and personal identity." (Emphasis added.) Some of us see a difference between the legal system acting to favor social norms that have traditionally proven of benefit for society—e.g., two parents are better than one for raising a child—and a system that provides the tools by which the government imposes new norms in the cause of social equity, a process that will produce employment for lawyers for generations to come.

In truth, hate speech is a bogus issue, representing not an attempt to reduce discrimination but a cynical instrument to muzzle criticism of the failures of half a century of quasi-socialistic government programming. When people protest against affirmative action or immigration, it is not the minorities or the Mexicans against whom they are being "hateful." They are exercising their censorial power against government policy. Even eminent legal scholars run scared in the face of this cynical criminalization of speech.

As Post himself points out, law "actually enforc[es] the mores of the dominant group that controls the content of law." It appears that the role of convention, tradition, and the "group attitudes we all carry around in us" (and the support of those by the law) is on the decline in Europe; in place of these, the enforcement of mores is remorselessly aggregated in an unelected class claiming to advance some overriding social good. Post's predecessor at Yale is Harold Hongju Koh, appointed by Barack Obama as legal adviser to the State Department, who has urged application of international law and foreign legal precedent in U.S. judicial decision-making. Imagine the European Court of Human Rights as American law.

Speakers Corner, Hyde Park, London, 1956

JOHN DRYSDALE / KEYSTONE FEATURES / GETTY IMAGES

Offering specific instances of the way the process works in England (but without the obfuscation) is a chapter by James Weinstein, professor of law at Arizona State, and among the cases he discusses are ones that even the most hard-core American leftist might consider egregious violations of the First Amendment. One involved a Christian preacher who was arrested for violation of the Public Order Act for standing on a street corner in Bournemouth with placards bearing the slogans "Stop Immorality," "Stop Homosexuality," and the like. All his legal appeals were turned down by English courts. Weinstein sees in English law a disturbing tendency toward the exclusion of speech from public discourse—on the grounds of violating the rights of others—as a variation on Justice Holmes's test of "clear and present danger." America's early 20th-century experience, in the convictions of Eugene Debs and 2,000 other individuals for their harsh criticism of American involvement in World War I, offers a valuable lesson today, writes Weinstein, for society has "a reliable tendency . . . to suppress ideas that offend dominant opinion." If you think the United States will avoid Europe's experience, note that the hate crimes legislation currently under discussion in the Senate would apply (according to the testimony of Attorney General Eric Holder) to preachers speaking out against homosexuality from the pulpit.

Weinstein's contributions to *Extreme Speech* and several other chapters (for instance, the one on Israeli law by Amnon Reichman) document impressive attempts by Western judiciaries to balance competing social goods. It was also a relief to read one sensible leftist—C. Edwin Baker of the University of Pennsylvania—who makes the point that the evidence doesn't show that hate speech regulation has much effect on curbing hate. Thus, while Michael Whine (director of the British defense agency of the Jewish community) contends that "a society's treatment of its Jews is a paradigm for how it will treat all minorities," the sad fact is that, despite criminalization of Holocaust denial, Jews in Europe are less secure than at any time since World War II—unlike in the United States, where even Nazis can march down city streets.

While *Extreme Speech and Democracy* highlights the continuing retreat in the West from freedoms achieved by our forefathers two centuries ago, non-Western peoples in many places in the world are putting their lives on the line for those freedoms. Freedom of speech, with the right to protest against government, is where the struggle begins. ♦

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B&A

Tactical Exercise

The Civil War was a contest between two sets of West Pointers. **BY BARTON SWAIM**

If we mean to play at war as we play a game of chess—West Point tactics prevailing—we are sure to lose the game. They have every advantage. They can lose pawns ad infinitum—to the end of time—and never feel it.

So remarked Wade Hampton, a brigadier general in the Army of Northern Virginia, in the bloody summer of 1862. Hampton was one of the war's few important leaders who hadn't attended West Point, and perhaps for that reason he could see more clearly that unless the Confederate armies found an imaginative way to annihilate their enemies, the war would become a contest of endurance—a contest the South could not win.

West Pointers and the Civil War
The Old Army in War and Peace
by Wayne Wei-siang Hsieh
North Carolina, 304 pp., $30

In this excellent new study Wayne Hsieh, an assistant professor at the U.S. Naval Academy, surveys what Hampton deprecated as "West Point tactics" from the end of the War of 1812 through the Civil War. His broad military-historical treatment allows him to make an intelligent answer to the question which every Civil War historian has to answer: Why did it grind on for so long?

On the face of it, the Union, with its vastly superior economy and functioning military bureaucracy, ought to have smashed the rebellion in a few weeks. There are, of course, many defensible explanations for why that didn't happen. Hsieh, an excellent scholar with a refreshingly well-balanced approach to military history, takes a view roughly comparable to Hampton's. His central argument is that both the Confederate and Federal armies were in large measure run by men trained at West Point, and that the half-century of strategic and tactical expertise passed down to these men gave the two sides an approximate equilibrium on the battlefield. What should have been little more than a sectional rebellion turned into a four-year fight to the death, he argues, because both sides possessed generals and officers with comparable levels of competence, almost identical training, and the professional ethos of the antebellum Army. The ranks of both sides remained more or less equal in cohesion and morale throughout most of the conflict, which finally ground to a halt when the South—rather like the United States itself a century later—could no longer sustain the sacrifice.

Accordingly, Hsieh rejects explanations for the war's unexpected length that depend too heavily on technological advances. A few influential scholars have, in recent decades, put forward the idea that the length and carnage of the war had primarily to do with technological advances in weaponry, chiefly the introduction of the rifle-musket in the 1840s and '50s. "Rifled" muskets had grooves cut into the inside walls of their barrels, giving bullets a spin, and therefore greater accuracy, when fired. These scholars hold that the greater range afforded by the rifle-musket—300 yards and even beyond—coupled with both armies' increasing reliance on entrenchments, tended to make it almost impossible for one to vanquish the other. Hsieh has no patience for this explanation:

> Taken as a whole, the outcomes of specific battles depended not so much on technology as on the characteristics of each army's individual leaders, its organizational virtues and vices, the force of circumstance, and the fighting qualities of the line troops involved.

He doesn't say this, but I can't help believing that the tendency to attribute undue significance to the rifle-musket is closely related to the fact that the vast preponderance of academics have never actually shot a rifle. To say a rifle is "accurate" at 300 yards is only to say that the bullet goes where its barrel is pointed. The trick is pointing it in the right direction. Hitting an immobile target at 300 yards is sufficiently difficult for a trained shooter using a modern scope-mounted rifle—and that's assuming the calm environment of an open field. A semi-trained recruit using a primitive rifle in the heat of battle, conscious that he may not live another day, has little chance of hitting a mobile target at a range greater than, I should guess, 75 or 100 yards.

(A number of scholars reference Cadmus Wilcox's 1859 manual, *Rifles and Rifle Practice*, which claimed rifle fire could be "destructive" of an enemy line at "1,000 or 1,200 yards." Wilcox was a serious practitioner, and went on to be an effective Confederate general; but this is either a typographical error or pure rubbish. Nobody outside the ranks of modern special-ops snipers can hit anything at 1,000 yards.)

Hsieh begins his story with the War of 1812, a conflict in which Americans began to doubt the ideal of the "citizen-soldier"—the belief, as Hsieh writes, that in times of war "sturdy yeomen . . . would leave their plows, defeat overdrilled professionals with the flexible virtue of freemen, and return to their farms after the danger had passed"—and to take seriously the nation's need for a professional standing army. In Detroit, in Queenston, Ontario, in Montreal, American forces were either thwarted or routed, and the nation's regular army proved ludicrously incapable of defending its own capital in 1814.

Over the next 30 years, during which the United States fought no bona fide nation-state wars but rather a series of localized skirmishes with hostile Indi-

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ans and the like, the antebellum Old Army achieved major improvements in two areas. First, it built an effective bureaucracy. Under the leadership of the better secretaries of war, principally John C. Calhoun, the War Department gradually gained the capacity to place well-equipped soldiers just about anywhere within the states and territories. Bold and brilliant generals can do little, as Hsieh explains, if their armies are poorly clothed and fed, and if they don't arrive at the right place at the right time. Second, the Old Army learned tactics. After the humiliations of 1812-14, the government sent abroad two graduates of the fledgling military academy on the Hudson River, West Point, for the purpose of gleaning insights from the great European armies. Debates raged within American military circles over an array of issues: the proper use of shock tactics, the most effective marching pace, the value of cavalry, the advantages of standardized artillery, and so on.

It paid off handsomely. By 1846, when war broke out with Mexico, the U.S. military proved itself capable of destroying a nation-state army of comparable size on that army's own soil. The Old Army conducted an amphibious assault, moved several thousand well-drilled troops and a siege train across South Texas and Mexico, and inflicted a string of decisive defeats on the Mexicans. Many of the victorious army's most capable and distinguished soldiers would, a little over a decade later, lead Union and Confederate troops into battle—among them Ulysses Grant and Robert E. Lee. The Mexican War moved the nation further away from the citizen-soldier ideal. The Old Army's ethos of professionalism would affect the course of the Civil War in highly consequential ways. Both armies' generals and policymakers, Hsieh argues, remained extremely reluctant to use guerrilla warfare or otherwise to dissolve the distinction between combatant and noncombatant.

Southern readers, of whom I am one, may bristle at this: The South Carolina State House, in which I work, still bears the scars of General Sherman's cannonballs. But Hsieh's point, which he supports amply by recourse to some fascinating primary documents, is entirely valid: The Confederacy never employed guerrilla warfare as a major part of its strategy, and the Union didn't use irregular methods until its more conservative generals, notoriously George B. McClellan, proved incapable of destroying the Confederacy on the battlefield.

U.S. Army troops at the Battle of Palo Alto, 1846

BETTMANN / CORBIS

As with the two armies' ethos, so with their competence on the battlefield—an equilibrium evident almost as soon as the fighting started. When the Confederates defeated the Union at First Manassas in the summer of 1861, they were too bloodied and disconcerted to deal the retreating army the kind of peremptory blow that might have brought the war to an early resolution. So it would go, as Hsieh's detailed analysis shows time and again, until the Overland Campaign of 1864.

Shock tactics were a constant challenge to both sides. Field commanders found it difficult to keep soldiers from firing prematurely. In an infantry charge, the vital thing is to hold fire until you can inflict maximum chaos; but charging soldiers found emotional release in pulling their triggers—a tactical problem illustrated poignantly at the Battle of Gaines's Mill during the Seven Days Battles of June-July 1862. Two Confederate charges had failed because troops would fire too early, stop to reload, and be cut down by short-range rifle fire from the Union line. Seeing the problem, Brigadier General John Bell Hood talked the men of his old regiment, the Texas 4th Infantry, into holding their fire as they walked up the hill one more time.

"Steady," Hood told his boys as they walked past corpses in gray uniforms, "I don't want you to run." They didn't, and their momentum rattled the Union line. The Federals abandoned the hill and the battle turned.

"We understood why General Hood wanted us to go to the enemy without firing," recalled one of the Confederates after the war, "for in piles all around us were other Confederates, who stopped to load their guns, [and they] lay dead and dying."

It's easy to forget that, while Northern and Southern electorate-s reached the point of irreconcilability in 1861, their armies remained identical in almost everything but uniform. Just as Northerners and Southerners prayed to the same God (as Abraham Lincoln would say in his Second Inaugural), so their generals had read the same books, their officers had used the same tactical manuals, their recruits had suffered through the same drills.

"This rough equilibrium in competence continued throughout the war," Hsieh concludes, and "made the annihilation of a Civil War field army in a set-piece battle—the great Napoleonic dream of Civil War commanders—a supremely difficult task." ♦

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B&A

Older Fiction

New novels from the aging 'enfants terribles' of British letters. **BY TED GIOIA**

In 2006 the Muslim writer Ziauddin Sardar coined the term *blitcon*—a compression of "British literary neoconservatives"—as a term of abuse leveled at three writers who irritated him with their belief that "American ideas of freedom and democracy are not only right, but should be imposed on the rest of the world." The three guilty culprits: Martin Amis, Ian McEwan, and Salman Rushdie. Alas, Sardar was forced to admit that this same trio dominates the British literary landscape, even enjoying front-page fame in an era when most fiction writers find their name in the paper only if their publishers take out an ad.

The Pregnant Widow
by Martin Amis
Knopf, 384 pp., $26.95

Solar
by Ian McEwan
Nan A. Talese/Doubleday, 304 pp., $26.95

Now, two of the blitcons have released major novels within a few days of each other. Amis's *The Pregnant Widow* and McEwan's *Solar* are generating buzz on both sides of the Atlantic, and are likely to spur further comparisons between two literary lions of roughly the same vintage (McEwan is 14 months older). Both were born at the end of the 1940s, came of age in the fast and loose 1960s, and are now in their 70s as celebrity scribes. McEwan may have more clout with the literary establishment—perhaps best measured by his six appearances on the annual Man Booker Prize short list, compared with just one for Amis—but Amis takes more chances, both in his public persona and his published works.

Indeed, few Americans can appreciate how "controversial" Amis has become in Britain, and how even his smallest actions undergo journalistic scrutiny. Recently the British press spun dozens of stories out of accusations that Amis had puffed on a cigarette at the deathbed of a friend. The matter got so blown out of proportion that Christopher Hitchens, the author's longtime friend, was forced to enter the fray, calling the accuser "spiteful and false" and admitting that he, Hitchens, may have been the one to light up. In other instances, Amis has been called to task by the press for everything from his frank comments on radical Islam to his salary at Manchester University—$120,000 for 28 hours of work a year.

Those looking for controversy may find an agreeable dose in Amis's new novel. Even if the author didn't repeat at several points that "all this really happened," you would suspect that the story was drawn from true events. At the very start, the narrator announces:

> Not even the names have been changed. Why bother? To protect the innocent? There were no innocent. Or else all of them were innocent—but cannot be protected.

Despite the disclaimer, the names are changed here. The protagonist's sister Violet clearly draws on Amis's own sibling Sally, whose alcoholism contributed to an early demise, in 2000, at the age of 46. Elsewhere, we seem to encounter figures based on Hitchens, Ian Hamilton, and perhaps even fellow blitcon McEwan (is he the basis for a minor character here named Ewan?). And our main player, *littérateur* and aspiring writer Keith Nearing, is an obvious stand-in for the author in this story of young bohemians coming of age during the sexual revolution.

You could probably win some wagers with this book. During my college days, my friends and I played a betting game with *The Sun Also Rises*. The rules: You offered to pay two-to-one odds to anyone who could open up a random page and not find characters either eating or drinking. *The Pregnant Widow* promises to be an even bigger moneymaker on the literary betting circuit: I challenge you to find a page where the characters are not talking about sex. I suspect I could raise the odds to five-to-one and still end up raking in the cash.

Note that I said *talking* about sex, and not the dirty deed itself. Even when his characters decide to couple, Amis typically prefers to present the verbal prelude or the postgame wrap-up instead of calling the play-by-play action. The sheer amount of tawdry banter here is staggering, and even after 300 pages Amis is going strong with dialogue and observations that are a cross between fraternity bragging and advice from a *Cosmopolitan* how-to article: "The uniform, that of a French maid, was in many ways a success. But it left something to be desired." Etcetera.

Then again, Amis occasionally takes a highbrow approach: His bookish characters uncover previously unknown sexual themes in everything from Shakespeare to *Pride and Prejudice*, and sometimes conspire to act out the key scenes in full costume. The plot, admittedly thin, transpires in a castle in Italy in 1970, where a changing cast of visiting twentysomethings test the new liberties of the era. With a flushed sense of excitement they make up their own rules—on what to wear (sometimes nothing at all), where to sleep, and most of all how to describe and theorize this bawdy behavior in words. If, as the narrator asserts at the end of the book, "pornographic sex is a kind of sex that *can be described*" (emphasis is Amis's), then *The Pregnant Widow* could serve as a compendium and case study.

But Amis is not blind to the unpleasant results that often follow the abandonment of moral strictures. Amis has suggested that the sexual revolution contributed to the death of his sister Sally, and a similarly self-inflicted trauma can be followed here in the character named Violet. In contrast, the

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hero Keith's sexual license of the 1970s may not prove fatal, yet it also exerts a lingering destructive aura over his later life. In case readers fail to pick up on this—which they might, given the light-hearted and capricious nature of most of the narrative—Amis adds a long coda, in which he outlines what happened to his various characters over the four decades following their decadent Italian sojourn.

Ian McEwan's *Solar*, in many ways, picks up where Amis's novel concludes. We encounter his hero Michael Beard *after* his decades of debauched living. He is at the tail end of his fifth marriage, each of them destroyed by his infidelities. He drinks too much. He's grossly overweight and out of shape. He is petty and scheming. But he has one big thing going for him: a Nobel Prize in physics for his Einstein-Beard Conflation, a CV entry that helps him charm ladies and gain sinecures.

McEwan, no doubt, wrote most of this novel before the recent Climategate scandal, but his protagonist would be at home in the world of compromised research and controversial think tanks. Beard has parlayed his notoriety into a government job launching a National Center for Renewable Energy, where he is wasting large sums of taxpayers' money on a rooftop wind-power machine that will never become a commercial reality. He eventually switches allegiances to solar power, but only after stealing valuable intellectual property from one of the scientists working for him at the center. Although Beard was initially cynical about global warming and its vocal advocates, he jumps on the bandwagon as a way of advancing his own moneymaking solar scheme.

Yet Beard's crimes at the office are modest compared with those he perpetrates at home. The same scientist whose work Beard has stolen dies in an accident at the Nobel laureate's house—where he is having an affair with the latter's wife. Beard uses this circumstance to incriminate another romantic rival, peppering the accident scene with bogus evidence that will eventually send an innocent man to prison for homicide.

The plot is intricate and full of unlikely coincidences; yet McEwan is justly famous for his meticulous plotting, and a certain baroque beauty adheres to his interweaving storylines. The novel begins in 2000, and by the time of its final pages, set in 2009, McEwan has deftly integrated the scientific, domestic, romantic, and criminological elements of his narrative—and somehow manages to have everything come due at once.

Solar is noteworthy for another McEwan trademark: his immersion in the occupational realities of his characters. In *Saturday* (2005) he conveyed the surgical expertise of his neurosurgeon hero with intense realism. In *Atonement* (2001) he revealed the same attention to detail in his account of a soldier in the aftermath of the Battle of Dunkirk, and in his story of a World War II nurse in a London hospital. (McEwan's research on the latter got him embroiled in trumped-up charges of plagiarism. The accusations had little substance, but the resulting tabloid coverage may have influenced passages in *Solar* that describe Professor Beard's run-ins with the press.) Now in *Solar*, McEwan attempts to take on the mantle of a famous physicist, and again he has done his homework, creating a magnificent protagonist who moves effortlessly and plausibly from professional to personal concerns.

Ian McEwan's writing is tighter than Martin Amis's, more attuned to pacing and narrative flow. Amis, true to form, is flashier and funnier, and shows he can still wield his caustic wit like a rapier—so much so, that the reader may likely forgive the self-indulgence and meandering of the story line. In short, both of our blitcons are doing what they do best, and it's reassuring to the rest of us to see these children of the sixties make the leap into another sort of sixties with such command and panache. ♦

B&A

The Big $creen

There are economic, as well as artistic, explanations for the movies. **BY JONATHAN V. LAST**

In 1929, the year the first Oscars were awarded, 95 million Americans—80 percent of the population—went to the movies each week. Seven hundred feature films were released into the nation's 23,000 movie theaters, most of which were quite large. New York's Roxy theater, for instance, held 6,200 people.

The Hollywood Economist
The Hidden Financial Reality Behind the Movies
by Edward Jay Epstein
Melville, 240 pp., $16.95

Today about 20 million people go to the movies every week, which is just about 6 percent of the population. There are only 7,000 movie theaters. The theaters have multiple screens—there are 38,000 screens nationwide—but much smaller auditoriums, many of them containing fewer than 300 seats. What happened? Well, lots, and Edward Jay Epstein explains much of it in *The Hollywood Economist*.

Take just one component of the equation: theater size. In the old days, seats in a theater were all on one level, which gradually sloped downward toward the screen in the front of the room. Very few of these seats—only about a third of them—were near the standard for optimal viewing. In 1995 American theater owners began experimenting with a new kind of design, stadium seating, which put rows of seats in vertical tiers. Suddenly two-thirds of the seats in a theater were optimal, which was a boon to moviegoers.

The problem was that this new design ran afoul of the Americans With Disabilities Act, which specified that in

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auditoriums with more than 299 seats, all rows must have wheelchair access. The Department of Justice sued theater owners for their stadium-seat configurations. It is impossible to give wheelchair access to every row in a stadium-seat theater, so, Epstein reports, the industry responded by scaling back the size of auditoriums to stay below the 299-seat threshold.

Ever wonder why movies don't have as much nudity as they used to? Epstein explains that, too. The answer is Wal-Mart. In 2007 the six major studios made $17.9 billion in DVD sales, $4 billion of which was from Wal-Mart, the world's largest retailer. Wal-Mart has a policy which forces any film with sexually related nudity away from high-visibility shelf space and into more obscure "adult" sections of the store. (This is so as not to offend mothers, who are there not to buy low-margin DVDs but high-margin items such as clothes, toys, or electronics, Epstein explains.)

Epstein's last book about Hollywood economics, *The Big Picture*, dealt largely with explaining how important those DVD sales are to movie studios. Consider the picture *Gone in 60 Seconds*. Produced and distributed in 2000 by Disney, *Gone* cost $103 million to make and took in $242 million at the worldwide box office. Yet it concluded its theatrical run as a $95 million loss. Follow the bouncing ball:

Of the $242 million in ticket sales, theater owners kept $139.8 million, a standard percentage. The studio took home $102.2 million. From this they deducted the cost of distributing the film: $67.4 million for advertising, $13 million for prints, $10.2 million for insurance, and so on. Which left *Gone* with an adjusted gross of $11.6 million. Various profit participants (stars, producers, etc.) took their percentage from this rump, leaving *Gone* with that $95 million loss.

Then came the DVD release, where *Gone* took in another $198 million. Because of the accounting schemes used for DVD sales, Disney kept $158.4 million of this; only $39.6 million was credited to the movie production itself. This sleight-of-hand persists down the line, with the studio keeping larger and larger percentages of income from ancillary sources—cable, pay TV, toys, and whatnot. Even though *Gone in 60 Seconds* the movie generated nearly $500 million in revenues for various parties, by 2008, *Gone in 60 Seconds* the production was actually sinking further and further underwater, its losses climbing to $155 million as residual cuts and interest payments kept piling up.

Earthlings vs. Na'vi in 'Avatar'

So if the theatrical release is a loss-leader, why do the studios bother with it? Because they need it to generate interest in the ancillary markets. Epstein's major insight in *The Hollywood Economist* is how studios manage their theatrical releases. It's hard to believe, but back in 1929, when 80 percent of America went to the movies every week, the studios didn't bother to advertise. There was a movie audience every week, no matter what the movie was. Television changed everything. When TV arrived in the 1950s, it began eating into the number of tickets being sold. Over time the "weekly movie audience"—people who went to the movies every week, regardless of what was playing—all but disappeared.

"The studio, realizing that they could no longer count on habitual moviegoers to fill theaters, devised a new strategy: creating audiences de novo for each movie via paid advertising," explains Epstein. This was an expensive proposition. The author reports that in 2007, studios spent an average of $35.9 million per film in advertising. The logic of this decision has heavily influenced the kind of movies Hollywood makes. In the old days, studios created movies to satisfy an existing audience; today they design movies to create an audience of people who will, on a single given weekend, come to see that film. Those are very different businesses, and they produce very different products.

It is often lamented that Hollywood only makes movies aimed at 14-year-old boys. The lament is not entirely untrue. It's also not unreasonable. As Epstein notes, "The studios zero in on teens not because they necessarily like them, or even because teens buy buckets of popcorn, but because they are the only demographic group that can be easily motivated to leave their home." Not only that, but teens are relatively easy to reach via advertising because they tend to cluster around the same, predictable TV programs. Even better, these programs are often on cable, where advertising costs are lower than on broadcast television. And better still, teens buy videogames and fast food, two common movie merchandising offshoots. Which is why the same industry that once churned out movies such as *Notorious* and *The Philadelphia Story* by the truckload now produces disposable products such as *Tomb Raider* and *Pirates of the Caribbean: Dead Man's Chest*.

The most dispiriting thing about *The Hollywood Economist* isn't a revelation that the Hollywood system has somehow failed. It's that the system is working exactly as it's supposed to work. ♦

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B&A

Holy Deadlock

Marriage is an institution, and who wants to live in one? **BY JOAN FRAWLEY DESMOND**

Traditional marriage is on trial from coast to coast, most recently in a San Francisco courthouse, where same-sex marriage advocates implied that this social institution had been established for a darker purpose, serving as a handy prop for gay bashing. Now Elizabeth Gilbert, the witty and honest author of *Eat, Pray, Love: One Woman's Search for Everything Across Italy, India, and Indonesia*, has joined the prosecution—more or less. Her new book isn't designed for policy wonks, though; it's also difficult to predict whether her admirers, hungry for the next installment of her engaging memoir-cum-travelogue, will embrace it.

Committed
A Skeptic Makes Peace with Marriage
by Elizabeth Gilbert
Viking, 304 pp., $26.95

So why should anyone care what Elizabeth Gilbert, a divorced writer, has to say on this vexed subject? Well, recognized expertise on marriage is no longer the preserve of pastors, historians, legal scholars, therapists, or yentas. In the San Francisco trial, and during the hearings preceding the Washington, D.C., city council's vote to legalize same-sex marriage, gay and lesbian couples testified to their love—a state of mind and heart that directly challenged a status quo that supposedly devalued their experience. Personal stories have moved to the center of the national conversation on marriage, pushing aside tired arguments based on natural law, historical and cultural precedent, and even human reproduction.

A heterosexual woman contentedly living and traveling with her lover, Felipe—an older but wiser Brazilian with an Australian passport—Gilbert wasn't looking to join the melee over matrimony. You might say that the subject was foisted on her by the Department of Homeland Security, which informed the couple that Felipe could not reenter the United States unless they married. The victim of a "bad divorce," the author immediately fretted that marriage would introduce a fatal toxin into her blissful union. However, as the subtitle implies, she found a way to get the job done without sacrificing her principles. The question is whether her expedient solution—reflecting a broad trend to reformulate marriage according to personal tastes—is likely to secure her future happiness, or the survival of an already battered social institution.

Committed begins with Felipe's ignominious repatriation, following a six-hour interrogation at the Dallas airport. Distraught, Gilbert pleads Felipe's case to a Homeland Security official, who is unmoved by her personal crisis: "When we have something to tell you about your boyfriend, miss, we'll let you know." Gilbert guesses the reason for his dismissive stance: "There is perhaps no more feeble-sounding word in the English language than *boyfriend*." Thus commences her painful engagement with the cultural, religious, and legal legacy that burdens and elevates spousal relations—as opposed to the essentially inconsequential status of couples who merely play house.

When Gilbert joins her exiled lover in Southeast Asia, he works on his immigration case file. She uses the time to retrace the missteps that led to her past divorce while addressing the larger subject of marriage as an institution. Her ruminations are punctuated by encounters with ordinary people in Laos and Cambodia, but the snapshots of exotic traditional cultures aren't especially relevant to Gilbert's modern dilemma. She also reveals flashes of insight gleaned from self-directed studies in history and anthropology. Readers would be wise to conduct their own research, however, rather than relying on Gilbert's scattershot approach: Her selective account of the checkered history of Western marriage, for example, encourages the reader both to doubt the motives and logic of its supporters and to shrug off radical new proposals as minor innovations.

Gilbert's reflections are skewed, in part, by her lack of personal interest in bearing children. The central purpose of marriage always has been the regulation of human reproduction and the education and upbringing of children.

Opponents of same-sex marriage have cautioned that children will be the innocent victims of any institutional redefinition that moves procreation to the sidelines, but Gilbert finds this argument unpersuasive, and predicts that the advent of "marriage equality" will actually reverse the declining status of marriage.

On a personal level, she is more preoccupied with the intrusive impact of marital responsibilities on her comfortable, autonomous existence, and her internal struggle exposes the dividing line between traditional marriage and its beguiling substitutes. In the wake of Felipe's deportation she maintains her drumbeat of undying devotion, even as she frets over the useless encumbrance of social expectations that come with a marriage license. But as she moves closer to zero hour, the reader perceives an important truth: The specter of permanent public vows injects a measure of transparency regarding personal intentions in romantic relationships. A bit squeamishly, Gilbert negotiates a pre-nuptial agreement that protects her, the wealthier party, in the event of divorce.

There are "committed relationships," and then there is marriage.

Gilbert's ultimate solution is to "subvert" the institution by ignor-

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ing practices and expectations that don't suit her rugged individualism or modern notions of commitment. Pointedly using the term "subvert," she acknowledges an almost outdated notion: An objective state of marriage exists beyond the couple's emotional life, and they ignore the demanding, inconvenient truths embedded in the institution at their peril. In other words, advocates of traditional marriage would press the point a bit further: All things being equal, an earnest commitment to wedding vows secures personal dignity and the common good for the family and for society. Gilbert doesn't spell this out, precisely, but her honesty contributes to her appeal as a self-appointed guide.

In the end, the author ties the knot with Felipe. But she finesses the question that likely will complicate her own future, and that of the larger culture: Is it really possible, and quite harmless, to make marriage whatever you want it to be? ♦

B&A

Kids With Cameras

The myth of the big hit with the little budget.

BY JOHN PODHORETZ

Journalists who write about movies just can't get enough of the same old song about a kid with moxie and gumption and ingenuity and guts who spends nothing but sweat equity to make a little movie that turns into a big sensation. Robert Rodriguez said his maiden effort, *El Mariachi*, cost him $7,000 in 1992; Kevin Smith said he used eight credit cards for the $27,000 he needed to make *Clerks* in 1993; the team behind *The Blair Witch Project* said they spent $35,000 in 1999; the makers of the very similar *Paranormal Activity* put its price tag last year at $15,000. The latest entry in the do-it-yourself sweepstakes also comes sporting a $15,000 budget: a New York comedy called *Breaking Upwards* starring a couple of twentysomething actor-writer-directors.

Breaking Upwards
Directed by Daryl Wein

Now, what the journalists who write about movies should know but often don't, or don't care to, is that they are being taken for a ride. Perhaps these tiny numbers approximate what was spent during the actual filming, but by the time of their release to the general public all these films had gone through a polishing process—color and sound correction, musical scoring, and the like. That doesn't come cheap. Creating a print that can be shown in theaters triples the amount of money that was spent on these projects, at the very least. And that's to say nothing of the cost of advertising and promotion.

No matter. It's a good story line and young filmmakers are sticking to it, with the collusion of a press corps that acts more like a public-relations arm of the movie business than a cool journalistic eye on it. The story is told to give potential viewers in the chattering classes a special kind of stake in the moviegoing experience, a sense that they may not just be seeing a film but will be participating in an act of artistic entrepreneurship simply by purchasing a ticket. Because what they are witnessing is a labor of love, it must therefore be higher and better and more valuable. Because the movies were made with go-getter urgency and passion, they are to be considered somehow more real, more authentic, more honest.

In the end, of course, it doesn't matter whether a movie costs some multiple of $15,000, like *Breaking Upwards*, or some multiple of $150 million, like *Avatar*. For the moviegoer, the only thing that matters is whether the film on the screen holds your attention, whether it has memorable scenes or lines or performances, and whether it leaves you feeling as though you've had a good or meaningful or amusing or interesting time watching it.

Breaking Upwards, which I watched in hi-definition on the OnDemand channel on my cable box on the same day it opened at a theater in Manhattan, qualifies, just barely, and maybe in spite of itself. Daryl (director-editor Daryl Wein) and Zoe (cowriter Zoe Lister-Jones) are bored with each other. So they decide they will take days off from their four-year relationship. She's a mildly successful actress; he's the gofer for a famous journalist. They have annoying Jewish parents. They're annoying. They get annoyed with each other. Then each of them goes out with someone else. That's about it.

The angular Zoe Lister-Jones is a fascinating camera subject. Daryl Wein keeps the movie chugging along through fast cuts. They talked three wonderful actors—Andrea Martin, Julie White, and Peter Friedman—into working for nothing as the parents, and they supply the amusement. Mostly, though, the movie's self-obsessed depiction of self-obsessed New Yorkers in their self-obsessed twenties had the effect of making me thrilled I'll be turning 50 next year. So by that standard, *Breaking Upwards* had a net positive effect on me. As it will on Wein and Lister-Jones, who will get more work as a result of it, which is really the point, after all.

The untold story of the we-put-on-our-own-show trope, though, is how it has led scores of untalented but desperately ambitious would-be filmmakers to waste millions of dollars of their family's hard-earned savings in the false hope that they, too, could be the next do-it-yourself star. That's what can happen when you believe what you read in the arts section. ♦

John Podhoretz, editor of Commentary, *is* The Weekly Standard*'s movie critic.*

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"Toward the end of a question-and-answer session with workers at an advanced battery technology manufacturer, a woman named Doris stood to ask the president whether it was a 'wise decision to add more taxes to us with the health care' package.... [President Obama] then spent the next 17 minutes and 12 seconds lulling the crowd into a daze. His discursive answer [was] more than 2,500 words long...."

—Washington Post, *April 2, 2010*

Remarks by the President at the 2010 White House Easter Egg Roll

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(cont'd)

as far as such fiscal long-term projections go, whether you ascribe to New Keynesian theory or not, and regardless of the subsets. But that just goes to prove my original point, pursuant to your initial query. Now remind me again about that question?

Q: What page are you on, Mr. President?

THE PRESIDENT: Oh right, page seven. That's where the Easter Bunny finds the last missing egg for his basket. Now do any of you other kindergartners have questions before I continue? Go ahead son, what's your name?

Q: Timmy, Mr. President. Can you just tell us how it ends?

THE PRESIDENT: Well, Timmy, you remind me of a lot of Americans who want to skip to the ending and get to what matters to them most. It is akin to the European critique of contemporary U.S. foreign policy before my administration, i.e., that we just want to cook; we don't want to clean. You see what I'm getting at? But you need to understand all facets of the argument and those quintessential elements that must be integrated in order to engender the desired outcome. Let's take, for instance, the people who are criticizing my health care reform agenda. They want to know how much are we adding to the deficit. Ultimately we're not. But let us also look at who will be benefiting and how. Suppose you're a small business owner and you don't provide insurance to your full-time employees. You should and you will. But under my plan you'll receive a small-business tax credit so that you will be incentivized to do the right thing. Some of my advisers have also been very bottom-line oriented when it comes to negotiating with our Russian counterparts—in the end, have we done enough to prevent nuclear proliferation? If you look at where our two nations are in the Strategic Arms Reduction Talks, you will also see precisely how we come to those numbers and why. Yes, the bottom line is important, but so is how we get there. Not that I am a fan of the process. And the process for creating a consensus bill for energy reform policy is one I tend to divide into ten different parts. But to go back to my first point on health care, if you are sick while employed, then are no longer employed, what happens to COBRA? Will the 65 percent of COBRA that was supposed to be taken care of thanks to the Recovery Act—yes, sweetie? You have a question?

Q: There's a cobra in this story?

THE PRESIDENT: Why, yes. But there is nothing to fear about the Consolidated Omnibus

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